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REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
OF THE
STATE OF CALIFORNIA,
AT THE
JANUARY, APRIL, JULY & OCTOBER TERMS, 1874.

CHARLES A. TUTTLE,
REPORTER.

VOLUME 48

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JANUARY TERM 1874.

REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
JANUARY TERM, 1874.

EX PARTE HOGE.

BAIL PENDING AN APPEAL.—A defendant who has been indicted and convicted of an offense for which the Court may, in its discretion, sentence him for a felony, or for a misdemeanor, is entitled to be admitted to bail, pending an appeal which is not frivolous, and is taken *bona fide*.

The Municipal Criminal Court, in which the petitioner was convicted, is a Criminal Court in the City and County of San Francisco. The defendant was tried and convicted in November, 1871, and brought before Mr. Justice WALLACE in the same month, to be discharged on bail, pending an appeal to the Supreme Court.

[The case was not reported, and my attention having been called to it by the Chief Justice, I give it a place here.—REPORTER.]

By WALLACE, J.:

The petitioner, lately under indictment for an assault with a deadly weapon, alleged to have been made upon one Dwyer, with intent to murder him, was, upon trial in the Municipal Criminal Court, found guilty of an assault made with a deadly weapon, with intent to do a bodily injury. The punishment provided by statute for this last offense is a

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fine or imprisonment, or both. Upon this conviction the Municipal Court adjudged him to suffer imprisonment in the State Prison for the term of eighteen months, and from this judgment he has appealed to the Supreme Court. Upon taking his appeal, he applied to the Judge of the Municipal Court to be admitted to bail pending the appeal, and his application was refused. It is understood that the learned Judge, in thus refusing the application, did not maintain that the prisoner might not lawfully be admitted to bail pending the appeal, but, holding that the prisoner had no absolute right to go at large upon bail after conviction, the Judge was further of opinion that it would be more appropriate that the mere discretion to admit him to bail, under the circumstances, should be exercised by the Supreme Court, to which the appeal had been taken, or by some one of its Justices. The counsel for the petitioner, in the argument upon the hearing before me, insisted that as the prisoner is not charged with a capital offense, he has an absolute constitutional right to be at large upon bail pending the appeal; and that upon the fact of his conviction for this offense, minor in its character, and upon the further fact of an appeal having been taken from the judgment, it is my bounden duty to admit him to bail, and that I have under these circumstances no discretion to refuse the application. In support of this proposition the counsel cited section seven, Article I, of the Constitution of this State, and which is in the following words: "All persons shall be bailable by sufficient sureties, unless for capital offenses, when the proof is evident or the presumption great."

The argument is, that it was the evident purpose of the framers of the Constitution to abrogate that somewhat unbounded discretion which the Judges are known to have exercised at common law in allowing or refusing bail, and which is said to have "ever been regarded with jealousy by a people tenacious of liberty." It is said that the liberty of the citizen was not intended to be left with no more reliable safeguard against its violation than the mere discretion of a Judge. That if the offense charged be capital in degree, then an inquiry must be directed to ascertain if the

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proof upon which it rests is evident or the presumption great. That if it appears upon such inquiry that the proof is not evident nor the presumption great, the right to be admitted to bail is absolute, even in such a case. But that, however this may be in regard to capital offenses, the expression of the Constitution with reference to cases below the capital degree is clear and unqualified that "all persons shall be bailable by sufficient sureties." That the case of Hoge does not involve a capital offense, and, therefore, he is "bailable by sufficient sureties." That this was his status before his late trial, and that his subsequent conviction of a minor felony does not alter the degree of the offense with which he is charged, or constitute it one of a capital character; that the rule laid down by the Constitution upon the subject of bail refers only to the degree of the offense charged as being capital or less than capital, and was not intended to distinguish between cases pending for determination in the Supreme Court upon appeal, and like cases pending for determination in a Court of original criminal jurisdiction. I have sufficiently stated the argument to develop the point made, and to show how it is said to bear upon the case in hand. The constitutional question thus presented is obviously of surpassing importance, and will be found to have divided the views of some of the highest Courts of the country. As it is already pending for decision in the Supreme Court of this State (*Ex parte Voll*), and as, I think, the prisoner is entitled to bail upon other grounds, I need not express my views upon it here, nor particularly examine it further.

By statute concerning the writ of *habeas corpus* (Art. 2555), it is declared to be my duty to dispose of the prisoner "as the justice of the case may require;" and by another statute concerning admission to bail (Art. 1721), it is provided that in such a case as this in hand, bail may be allowed or refused "as a matter of discretion." This "discretion" to do "justice" is not, however, an arbitrary discretion to do abstract justice according to the popular meaning of that phrase, but is a discretion governed by legal rules to do justice according to law, or to the analogies of

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the law, as near as may be. The case of the prisoner is almost within the very letter of the statute allowing bail upon appeal; for the offense of which he was convicted was one which might have been punished by the infliction of a fine merely. It was within the discretion of the Court to impose the fine or to adjudge the imprisonment. Either would have satisfied the statute which the prisoner had broken. Had the fine alone been imposed the positive rule of the statute would have permitted him to go upon bail pending an appeal. (Art. 1721.) Yet his offense is the same, whether he be fined or be imprisoned. In case the mere fine had been imposed, the statute itself set him at liberty on bail pending an appeal. Now that the imprisonment, however, has been adjudged, the statute leaves it to my discretion to admit him to bail or not, as justice may seem to require. If my discretion is to be interpreted by the rule of the statute in the other case, and I think it ought, I am unable to see why the prisoner prosecuting an appeal should absolutely go at large in the mean time in the one case, and absolutely go to the State Prison in the meantime in the other.

On the argument before me, attention was called to portions of the charge given to the jury on the trial of the prisoner, and also to the rulings of the Court in excluding certain evidence offered upon his behalf. It is not proper that I should intimate an opinion as to the ultimate determination of the points which it is the purpose of the appeal to present for the judgment of the Supreme Court. They are sufficient, in my judgment, to show that the appeal is *bona fide*, and that the case made is not to be characterized as frivolous or unsubstantial. I think that should I, under the circumstances, refuse to admit the prisoner to bail, it would be a misapplication of the discretion conferred by the statute. The right to appeal to the Supreme Court is guaranteed by the Constitution to the prisoner, and is as sacred as the right of trial by jury. It is one of the means the law has provided to determine the question of his guilt or innocence. Upon such an appeal, the ultimate question is nearly always as to the validity of the judgment under

Points decided.

which the prisoner is to suffer; and it is certainly not consonant to our ideas of justice, if it can be prevented by legal means, that even while the question of guilt or innocence is yet being agitated in the form of an appeal, the prisoner should be undergoing the very punishment and suffering the very infamy which it was the lawful purpose of the appeal to avert. It would be somewhat akin to a practice of punishing the accused for his legal offense while the jury was yet deliberating upon the verdict.]

Under these circumstances of this case, I shall order that the prisoner be admitted to bail, pending the appeal, in the sum of four thousand dollars.

[No. 2,840.]

ISABELLA McMANUS, ADMINISTRATRIX OF THE ESTATE OF TERENCE B. McMANUS, DECEASED, v. C. D. O'SULLIVAN, WILLIAM F. CASHMAN, JOHN HAYES, PETER DONOHUE, PATRICK KELLY, C. M. A. BUCKLEY, MARY E. BUCKLEY, CHARLES BAUMAN, GEO. T. BOHEN, DAVID HUNTER AND THOMAS McGUIRE.

ADVERSE POSSESSION OF LAND.—An adverse possession of land which will bar an action to recover possession of it, under the Statute of Limitations, is a possession merely hostile to the particular claim of the other party in the action, to which it is opposed in proof.

IDEM.—Such possession does not lose its character as adverse, because it is in subordination to the title of the paramount proprietor, unless the other party deraigns his claim from such paramount proprietor.

LIMITATION OF ACTIONS.—A person in the mere naked possession of Pueblo land in San Francisco, and whose claim is not connected with the title of the city, and who was ousted in 1861 by a party who thence held adversely to him, cannot insist that such party shall be deprived of the benefit of the Statute of Limitations, because holding in subordination to the title of the city.

STATUTE OF LIMITATIONS.—The Statute of Limitations did not commence running against the city of San Francisco, with reference to the Pueblo lands confirmed to it by the decree of the Circuit Court of the United States, May 18, 1865, until the passage of the Act of Congress of March 8, 1866, quieting the title of the city to said lands.

Statement of Facts.

PRESUMPTION AS TO TITLE ARISING FROM POSSESSION.—The mere fact that a party held possession of Pueblo land within the limits of the city of San Francisco for the period of several years, prior to 1861, and then died, raises no presumption, in an action brought by his intestate to recover the land, that this possession was connected with the title of the city.

PUEBLO LAND IN SAN FRANCISCO.—A person who was in the mere naked possession of Pueblo land in San Francisco, and who did not hold the same under a grant from the authorities of the Pueblo, was not a beneficiary under the decree of the Circuit Court confirming said lands to the city.

IDEM.—A person who was in possession of Pueblo lands in San Francisco prior to 1861, but who was ousted therefrom, did not become a beneficiary under the Act of Congress of March 8th, 1866, and ordinance No. 800 of said city, and the Act of the Legislature confirming it, unless he had recovered possession.

APPEAL from the District Court, Fourth Judicial District, City and County of San Francisco.

The City of San Francisco, as successor of the Pueblo of that name, asserted title to four square leagues of land, and presented its claim to the Board of Land Commissioners created by the Act of Congress of March 3d, 1851. The Board confirmed the claim to a portion of the land, and rejected it for the balance. The city appealed to the District Court, from which Court the case was transferred to the Circuit Court. The Circuit Court confirmed the claim to four square leagues, and the decree was entered May 18th, 1865. From the decree of the Circuit Court a writ of error was prosecuted to the Supreme Court of the United States, and while the case was pending there, Congress, on the 8th of March, 1866, passed the Act "to quiet the title to certain lands within the corporate limits of the City of San Francisco." This Act withdrew the claim from the further consideration of the Courts, so that no patent was issued for the land.

By the said Act of Congress the land was relinquished and granted to the City of San Francisco and its successors, upon the following trusts, namely: "that all the said land not heretofore granted to said city shall be disposed of, and conveyed by said city to parties in the *bona fide* actual possession thereof by themselves or tenants, on the

Argument for Appellant.

passage of this Act, in such quantities and upon such terms and conditions as the Legislature of the State of California may prescribe."

The Legislature, by the Act of 27th of March, 1868, prescribed the conditions to be: "Upon the payment to the County Treasurer, of Outside Land assessments (so called), the city relinquishes and grants all its title to the land upon which has been paid all taxes assessed for the five fiscal years preceding the year beginning 1st of July, 1866, unto the persons, or the heirs and assigns of persons, who were, on the 8th day of March, 1866, in the actual *bona fide* possession thereof by themselves or by their tenants, or having been ousted from such possession before or since said day, have recovered or may recover the same by legal process."

The demanded premises were a parcel of the lands thus confirmed to the city.

The other facts are stated in the opinion.

Calhoun Benham, for the Appellant.

Was a possession which was adverse to the plaintiff, but not to the city, a bar? It was not. There was no adverse possession. The sole evidence as to the character or intention of the defendants' possession was the plaintiff's admission. That admission did not concede it was exclusive.

Adverse possession must be exclusive of every other right than the one claimed. (Stat. of Limitations, Sec. 10.) The proof, as it stands upon the admission, taking it altogether, is that the defendants did not claim against the city, but, on the contrary, admitted her right. And the bald error is presented, of a Court instructing a jury to find for the defendants when the plaintiff had shown possession with claim of title, and defendants had offered no proof of anything in defense; for such is the result of defendants' showing if a bar was not made out. To bar and to prescribe are correlative. When one can bar he can prescribe, and *e converso*. The defendants could not prescribe. To make title by prescription, they must make it, above all, against the true owner. Here they did not make it against the true owner.

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The admission must be sufficient to cover the whole ground of adversariness. (*Sharp v. Daugney*, 33 Cal. 313.)

The admission does not concede that they entered under just title. It only concedes the naked possession. The naked possession raises for them the presumption that it began in just title. But the proof that the land belonged to the city—there being no proof that they claimed adversely to the city, either by grant from her or by dispute of her title—shows the possession did not begin in just title, or what is the same, did not begin to make title at all, and so was not an adverse possession to set the Statute of Limitations running. And plaintiff is not committed to the position that defendants' possession was adverse possession because the text of the admission uses those words, for they are used with a qualification. They are coupled with an exception which goes to the very essence of adversariness, namely, the exception of the right of the true owner. This is a case of "qualified adverse possession," spoken of by SANDERSON, in *Kimball v. Lohman*, 31 Cal. 154. What sort of adverse possession is that which does not give title against the only enemy to be feared, the owner?

The effect of this admission is to place parties as if defendants had proved that they had had possession for five years, and plaintiff had proved that they admitted the title of the city, as they do in their answer.

Did defendants make title by being in possession on the 8th of March, 1866?

They did not. They were not in possession on that day in good faith. They assume they were. Whether they were or not is directly involved in the principal question, whether the plaintiff can recover or not. The Act of Congress does not expressly provide for the case of a party out of possession, but entitled to recover on that day, as the Outside Land Ordinance does; but the effect to withhold title from the defendants at least is secured by the requirement of good faith.

If the plaintiff was entitled to recover on that day, and the defendants knew it; above all, if they had entered unlawfully, and with due notice of the plaintiff's rights, as

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they did, they were not in possession on that day in good faith. To say they were owners on that day is *petitio principii*. The maxim is *exceptio non potest adduci ejusdem rei cujus petitur dissolutio*.

In this controversy, neither the Outside Land Ordinance nor the Act of Congress of March 8, 1866, can assist either party. It was so held as to the Van Ness Ordinance in *Keane v. Cannovan*, 21 Cal. 291. The case rests upon the maxim quoted. The Van Ness Ordinance gives the land as the Outside Land Ordinance and the Act of Congress of March 8, 1866, give it.

The admission that defendants were in adverse possession against everybody but the city, during a time including the 8th of March, 1866, is not an admission they were so in good faith on that particular day, or at all. It has been suggested that it is. If it is, it must be because there is peculiar virtue in an admission.

Calhoun Benham, Alexander Campbell, E. J. and J. H. Moore, and S. Heydenfeldt, also for the Appellant.

Plaintiff shows prior possession. Prior possession is evidence of right of possession. (*Morton v. Folger*, 15 Cal. 275; *Catteras v. Cowper*, 4 Taunt. 547; *Allan v. Rivington*, 2 Saund. 111, and cases cited in note a.) Presumption of right of possession from prior possession is not silenced or rebutted, though it appear that title is outstanding in a third party. (Same cases.) Presumption of title is presumption of the true title, and if that is a given Spanish title, then of that title. Defendants show no title, because they were not on the land in good faith on the 8th of March, 1866. Plaintiff cannot be barred because her trustee, the city, is not barred. Plaintiff cannot be barred, because the title to the land was in the United States until March 8, 1866, a year only before suit was brought. (*Gibson v. Chouteau*, U. S. S. O. Cases, 1871.)

McCullough & Boyd, Sharp & Lloyd, M. H. Myrick, and Gray & Haven, for Respondents.

Argument for Respondents.

Where the true title is not in contest; where it is outstanding in the government; where it appears or is admitted that the legal title is outstanding, and that neither party connects himself with it, and their contest is only over those rights in the land that grow out of their respective possessions, there an adverse possession may obtain as between the parties to the contest. (*Page v. Fowler*, 28 Cal. 611; *Sharp v. Daugney*, 33 Cal. 511; *Vassault v. Seitz*, 31 Cal. 230; *LeRoy v. Rogers*, 30 Cal. 235.)

And it would seem that this doctrine is a necessary incident or corollary of that other doctrine long since established in this State, that where plaintiff relies solely upon prior possession, the defendant will not be permitted to show title outstanding in a stranger, to defeat the plaintiff's right of recovery; else, a party in possession of lands in 1850, may recover to-day against one who entered and ousted him, and has held adversely to him since 1851, where the true title is outstanding.

If this be so, then there is no statute of repose as to the tenure by which the great mass of the lands in this State are held and possessed.

The defendant showing a five years' adverse possession, where the plaintiff relies only on prior possession, shows a better right than the plaintiff, either because of the bar of the statute, or because of a presumed abandonment by the plaintiff in analogy to the statute bar. Either suits our purpose in this case. For more than five years after our entry and ouster, the plaintiff failed to sue. More than five years after her right of action accrued, and she asked redress of the Courts. (*Bird v. Lisbros*, 9 Cal. 1; *Coryell v. Cain*, 16 Cal. 572.)

Being in possession, and in possession adverse to the plaintiff for five years, and the plaintiff failing to connect herself with the paramount title, we show the better right to the possession. Plaintiff will not be permitted to overcome this better right shown in the defendants, any more than would the defendants be permitted, if the plaintiff sued within five years from the ouster, by proving title in a stranger. (*Carleton v. Townsend*, 28 Cal. 223.)

W. H. Patterson, also for Respondents.

To bar the plaintiff's cause of action, it was only necessary to have an adverse possession as against the plaintiff, because plaintiff is not connected with any right of the City and County, and does not deraign the right to recover from the City and County; and though it might be conceded that the City and County might have recovered against defendants, it does not follow that plaintiff can.

For illustration, the State granted a ninety-nine years term in certain water lots in San Francisco, and subsequently the fee or reversion. A. owned the term of 1860, and B. the fee; B. leased that year to C. for ten years, and C. took and held possession for six years, under his lease from B., but adversely to A. It is evident that while A. would be barred by C.'s adverse possession, yet he would not have had any possession to the exclusion of his landlord, B. So a tenant by courtesy — tenant for life or years, might be barred by an adverse possession against him, while the holder of the reversion would not be. (Sugden's Law of Vendors, 239, 240; 1 Burrows, 60; 2 Salkeld, 422; *Jackson v. Schoonmaker*, 4 Johns. 398; *Jackson v. Selleck*, 8 Johns. 268, 269; *Lessee of Hall v. Vandergrift*, 3 Binney, 374-384, bottom 385; *Jackson v. Johnson*, 5 Cow. 102, 103; *Wells v. Prince*, 9 Mass. 507, 508; *Wallingford v. Earl*, 15 Mass. 471.)

By the Court, WALLACE, C. J.:

At the conclusion of the plaintiff's proofs the defendants moved the Court for a nonsuit, but the motion was denied. One of the grounds upon which the motion was rested was "that the evidence does not show, or tend to show that the plaintiff or her ancestors, predecessors or grantors, or either of them, were seized or possessed of the premises, or any part thereof, at any time within five years next before the commencement of this action, or at any time since." In denying the motion for a nonsuit the judge observed that it would have been granted, had it distinctly appeared by the plaintiff's proofs that the defendants had held adverse possession

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of the premises for the period of five years next before the commencement of the action; and further, that should the defendants establish a possession of that character upon their part, he would thereupon instruct the jury to find their verdict for the defendants. The record then proceeds as follows: "Here the plaintiff admitted that defendants would introduce such proofs, and also would produce witnesses to prove that such possession of defendants was taken January 1st, 1862, under claim of title adverse to the plaintiff, but not to the City of San Francisco. Whereupon the plaintiff, by her counsel, in open Court admitted, for the purpose of this matter, that the defendants were in the actual, open, exclusive and notorious possession of the land in controversy for more than five years prior to the commencement of this suit, and on and ever since the 1st day of January, A. D. 1862, and had held the same from that date adversely to the plaintiff, her ancestors, predecessors and grantors, and to the estate of T. B. McManus, deceased, but not to the City and County of San Francisco." Upon the admission thus made, the jury were directed to find a verdict for the defendants, which being done, judgment was thereupon rendered, from which judgment the plaintiff presents this appeal.

1. The evidence on the part of the plaintiff tended to show that her intestate was in possession of the premises sued for from some time in 1853 until January, 1861, when he departed this life.

The motion for the nonsuit, in so far as it questioned the sufficiency of the possession held by McManus in his lifetime, was determined in favor of the plaintiff, and the decision having been put altogether upon the legal effect of the possession of the defendants, taken subsequent to his death, the propriety of the ruling in the latter respect is the only matter to be considered here.

2. The premises sued for lie within the limits embraced in the judicial decree in the case of the *United States v. The City of San Francisco*, entered in the Circuit Court May 18, 1865, within the area defined in order No. 800; and the Act of the Legislature of March 27, 1868, ratifying that

order; and the Act of Congress of March 8, 1866, entitled "an Act to quiet the title to certain lands within the corporate limits of the City of San Francisco."

3. If we are to consider the case of the plaintiff as resting solely upon the prior possession of her intestate, and wholly disconnected with the decree of the Circuit Court, the order of the Board, the Act of the Legislature, and the Act of Congress already referred to, it is plain that the possession of the defendants, if adverse in its character, was sufficient, in point of mere duration of time, to bar the plaintiff of a recovery in this action, for their possession, such as it was, began in January, 1862, and this action was commenced only in August, 1867.

4. It is claimed by the plaintiff, however, that the possession of the defendants was not of an adverse character, within the meaning of the Statute of Limitations; and this view is rested in part upon the circumstance that the possession relied upon, though held in hostility to the claim of the plaintiff, was nevertheless held in admitted subordination to the title of the City of San Francisco. But it has been repeatedly determined in this Court that a possession taken and held by a defendant for the requisite period, in hostility to the title or claim set up by a plaintiff in the action of ejectment, amounts to an adverse possession against the plaintiff, sufficient to bar a recovery, even though the defendant, while so in possession, admitted the validity of a title outstanding and in a third person. Thus, in *Page v. Fowler*, 28 Cal. 611, the case turned upon the question as to whether the possession of the defendant in that action was adverse in its character, and it was held that it was, notwithstanding the defendant entered upon the land, and claimed to hold it, conceding all the while that the title was in the Government of the United States, and which title he was avowedly endeavoring, by entry and occupation as a pre-emptioner, to obtain; the Court observing that to constitute adverse possession it is sufficient if the defendant in possession claims the right against all the world, except the United States.

Inasmuch as it was conceded in that case that the true

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title to the premises was in the United States, and that if the defendant should not succeed to it as a pre-emptioner, then it necessarily would go to Page under the Act of March, 1863, concerning the Suscol Ranch, the claim "against all the world" was after all a claim in hostility to Page alone, who was the only person challenging the right of the defendant in that action. The case came again to this Court (37 Cal. 108), and it was then held that a person in possession of land with the intent in good faith to obtain the title thereto under the pre-emption laws of the United States, must be taken to be in adverse possession under claim and color of title, in such sense that an action could not be maintained against him to recover hay cut upon the premises so in his possession. Again, in *Farrish v. Coon*, 40 Id. 57, in defining the phrase "adverse possession," it was said here as follows: "The very essence of an adverse possession is that the holder claims the right to his possession not under, but in opposition to, the title to which his possession is alleged to be adverse." So in *Hayes v. Martin*, 45 Cal. 559, this Court used the following language upon this point: "It is not requisite that a party who relies upon the statute should show that he claims title in hostility to the United States. He may admit title in the United States, either with or without a claim on his part of the right to acquire the title from the United States, and it is sufficient if he has such possession as is required by the statute, and claims in hostility to the title which the plaintiff establishes in the action." In view of these authorities, and others of a like import in this Court, which could be found, did time permit, an adverse possession must be taken to mean a possession merely hostile as against the particular claim to which it is opposed in proof; and it results that the possession of the defendants here, though held in admitted subordination to the title of the city, was nevertheless adverse to the title set up by the plaintiff, and therefore sufficient to defeat it, unless the plaintiff deraigns her claim from the City of San Francisco, which is the only remaining point to be considered.

5. The lands in controversy lie within the limits defined

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by the decree of the Circuit Court of the United States, of May, 1865, and without the corporate limits of the city of San Francisco, as defined by the Charter of April 15, 1851. Under the rule laid down in *Gardiner v. Miller*, (47 Cal. 570), the statute commenced to run against the title of the city only upon the passage of the Act of Congress of March 8, 1866, and, therefore, if the claim of the plaintiff is connected with the title of the city, the Statute of Limitations had not run against it when this action was brought. There was no direct proof at the trial that the plaintiff's claim was in anywise connected with the claim of the city. Counsel argue, however, that the presumption that it was, arises from the fact that the plaintiff's intestate for some seven or eight years next before his death, held possession of the premises, which were subsequently, and some four years after his death, confirmed to the city. We know of no rule of law upon which such a presumption could be indulged. That a party in possession is presumed to be rightfully there is true, and in that sense possession raises a presumption of right and of title in the possessor. This is the general rule, and is the doctrine of the cases of *Hawxhurst v. Lander*, 28 Cal. 331, relied upon by counsel; and also of *Hill v. Draper*, 10 Barb. 458; *Allen v. Rivington*, 2 Saund. 110, and *Catteras v. Cowper*, 4 Taunt. 542, cited by him. But a mere naked possession antecedently held by the plaintiff's intestate, and not sufficient in point of duration to entitle him to the protection of the Statute of Limitations, cannot operate to create a presumption that the claim of the possessor was connected with any particular source of title. It is true that under some circumstances a presumption of a grant to a party in possession may be created, and an instance of that character is found in *Mather v. The Ministers of Trinity Church*, 3 Sergt. & R. 507, cited by counsel, where the Court presumed a grant to the plaintiff from the Commonwealth for the premises, or a right of pre-emption thereto, upon it appearing that the premises, being in the midst of a very thickly settled country, and being extremely valuable, had been in the possession of

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the plaintiffs and their predecessors some ninety years, the Chief Justice observing that there is no absolute rule prescribed by law on which to found this kind of presumption, and that circumstances may require in different cases a different length of time. But there is no perceptible similarity whatever between the circumstances of that case and those of the one now under consideration, and no foundation is laid for such a presumption, in favor of the plaintiff here.

We are therefore of opinion that the mere possession of McManus did not, in itself, tend to connect his claim with that of the city, nor do we think that the case of the plaintiff derives any aid from the decree of the Circuit Court of May 18th, 1865, nor the Act of Congress of March 8th, 1866, (through which decree and Act the title of the city is derived,) nor from the Ordinance of the Board No. 800, nor the Act of the Legislature ratifying that ordinance, which deal with the terms and conditions upon which that title is to pass to the beneficiaries pointed to in the Act of Congress.

McManus was not a beneficiary under the decree of the Circuit Court, for he did not hold the premises under a grant from the authorities of the Pueblo, town or city of San Francisco; nor was he, nor was the plaintiff as his personal representative, a party in the *bona fide* actual possession of the premises, personally or by tenants, at the time of the passage of the Act of Congress — for the actual possession, whether held *bona fide* or not, was at that time in fact held by the defendants, as we have seen already, in hostility to the claim of the plaintiff. If it be even conceded, then, that (under the authority conferred upon the Legislature of the State by the Act of Congress to determine the mere quantity of land which the beneficiaries referred to therein were to receive and prescribe the mere terms and conditions upon which such beneficiaries were to receive the lands), it was competent to the Legislature to create a new and distinct class of beneficiaries as being persons who (though not in actual possession by themselves or tenants on the day of the passage of the Act of Con-

Statement of Facts.

gress), having been ousted from possession before or since that day, had recovered or might recover the same by legal process, the case of the plaintiff is not brought within the latter category. She had not recovered the premises before the passage of the Act of the Legislature, nor has she recovered since then. If the Act of Congress is, even therefore, to be taken, with the modification engrafted thereon, or attempted to be, by the Act of the Legislature confirming Order No. 800 of the Board, the case of the plaintiff is thereby brought directly within the views announced in *Pickett v. Hastings*, 47 Cal. 270, in which case we held, upon the construction of the provisions of the Van Ness Ordinance, in this respect similar to those we are now considering, that where an ouster had occurred, the fact of recovery had was indispensable to constitute a person a beneficiary.

It results from these views that the action was barred, and that the judgment of the Court below was correct, and should be affirmed; and it is so ordered.

Mr. Justice McKINSTRY did not express an opinion.

[No. 3,494.]

THE PEOPLE v. ALBERT OUTEVERAS.

ACCESSORY BEFORE THE FACT.—An accessory before the fact in the commission of a felony must be indicted, tried and punished, as a principal in the first degree.

ACCESSORIES BEFORE THE FACT ARE PRINCIPALS.—Accessories before the fact, that is to say, those who, not being present at the commission of the offense aiding and assisting, have, nevertheless, advised and encouraged its perpetration, are termed accessories by the statute, and under its provisions are made principals.

PRINCIPALS IN THE SECOND DEGREE AND ACCESSORIES.—Principals in the second degree, and accessories before the fact, are all deemed chief actors; that is, principals in the first degree in the commission of the felony, and are to be indicted, tried, and punished as such principals.

APPEAL from the Municipal Criminal Court of the City and County of San Francisco.

The defendant appealed from the judgment and from an order denying a new trial.

Opinion of the Court — Wallace, C. J.

The other facts are stated in the opinion.

E. F. Preston, for the Appellant, argued that there was a fatal variance between the evidence and the indictment, and that the Court erred in its charge to the jury, because the defendant could not be convicted of breaking and entering a house, when he merely stood at a distance while the felony was committed; and cited *People v. Schwartz*, 32 Cal. 160; *People v. Trim*, 39 Cal. 75, and *People v. Campbell*, 40 Cal. 129.

Attorney-General Love, for The People.

C. B. Darwin, also for The People.

Under the common law, all are principals in treason, and a result of this principle was, that the indictment ignored the distinction between accessories and principals.

When our statute abolishes the distinction between principals and accessories, as it does in plain terms, why should not the indictment ignore the distinction. If the accessory before the fact is by statute made principal, the acts of the principal become those of the accessory — are attributable to the accessory — the accessory is held accountable for the acts of the principal; and when you charge him with the same acts as the principal, or charge both jointly with the same acts, you are charging what is true. (1 Iowa, S. Greene, p. 114; *Berry v. State*, 10 Georgia, 511; *Shannon v. The People*, 5 Michigan, 71; *Baxter v. The People*, 3 Gilman, 368, and *Brennan v. The People*, 15 Ill. 512.)

By the Court, WALLACE, C. J.:

The prisoner was convicted, upon the statute of 1864, of a felony committed in breaking and entering a house in the day-time, with intent to commit larceny. The indictment under which he was convicted contains but one count, and alleges as follows: "The said Richard N. Carter and Albert Outeveras, on the 28th day of December, A. D. 1871, at the City, County and State aforesaid, about the hour of four of the clock, P. M., of the day-time of the same day,

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with force and arms, the building of one Clara N. Mann, there situate, feloniously did break and enter, with intent then in said building to commit larceny, contrary to the form, force and effect of the statute," etc.

It appears that the prisoner, in company with one Carter, jointly indicted with him, approached the house mentioned, when, in pursuance of an understanding had between the two, Carter entered the house and committed a larceny by stealing two silver cups therefrom. The prisoner did not enter the house, but, at the request of Carter, he waited outside, and in the immediate vicinity, for fifteen or twenty minutes, until the latter came out with the stolen property. When Carter emerged from the building with the cups in his possession, the prisoner inquired as to what property he had obtained, and being informed, the two repaired together to a room which they occupied together, and there endeavored to obliterate the names engraven on the stolen cups, and the prisoner, having afterwards put them in pawn, the two shared the proceeds between them.

The evidence was given under objection, and the prosecution having rested, the defendant moved the Court to instruct the jury to find a verdict of not guilty, on the ground that there was a fatal variance between the indictment and the proof, in that the indictment proceeded against him as being a principal in the felony, while the proof showed at most that he was "an accessory, aiding and abetting." This motion was denied, and an exception was thereupon taken by the prisoner. The Court then charged the jury, that if they should find the fact to be that Carter and the defendant had made an arrangement for stealing property, by which the actual taking was to be done by Carter, and that, in pursuance of that arrangement, the prisoner was present and waited outside the house while Carter went in and committed the larceny, they should find the defendant guilty, as charged in the indictment. To this instruction the prisoner reserved an exception.

Under the rule of the common law the circumstances in proof constitute the prisoner a principal in the second degree, as being constructively present, *ope et consilio*, aiding

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and abetting the commission of the act, with the design of giving assistance, and near enough to have actually afforded it had it become necessary. The statute concerning crimes and punishments (Sec. 11), is as follows: "An accessory is he or she who stands by and aids, abets or assists, or who, not being present aiding, abetting or assisting, hath advised or encouraged the commission of the crime. He or she who thus aids, abets or assists, advises or encourages, shall be deemed and considered as principal, and punished accordingly." Principals in the second degree, that is to say, persons who stand by aiding and abetting the act, and accessories before the fact; that is to say those who, not being present at the act, aiding, abetting or assisting, have, nevertheless, advised and encouraged its perpetration, are all termed accessories by the statute, and under its provisions are constituted principals. So by the Act to regulate proceedings in criminal cases (Sec. 255), it is provided as follows: "No distinction shall exist between an accessory before the fact and a principal, or between principals in the first and second degrees in cases of felony; and all persons concerned in the commission of a felony, whether they directly commit the act constituting the offense, or aid and abet in its commission, though not present, shall hereafter be indicted, tried and punished as principals." The substance of these provisions, taken together, is, that principals in the second degree and accessories before the fact, are all deemed chief factors; that is, principals in the first degree in the commission of the felony, and are to be indicted, tried and punished as such principals. Under the statute a prisoner can no longer be recognized as a principal in the second degree, nor an accessory before the fact in the commission of a felony. These distinctions no longer obtain for any purpose in the administration of the law of felony, the statute having substituted in their stead the more convenient rule of the common law of misdemeanors, where such distinctions had never been recognized. This was the view taken in 1846 by the Supreme Court of Illinois, upon a statute of which the eleventh section of our Act concerning crimes and punishments, will

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be seen to be an exact transcript. The prisoner had been indicted as a principal in the crime of murder, and, at the trial, the Circuit Court was asked to instruct the jury that evidence of guilt as accessory before the fact would not support a conviction under the indictment. The instruction was refused, and upon this point the Supreme Court said:

“The correctness of the decision of the Court in refusing to give these instructions must depend upon the construction of our statute. By the thirteenth section of the Criminal Code it is declared: ‘An accessory is he or she who stands by and aids, abets or assists, or who, not being present, aiding, abetting or assisting, hath advised or encouraged the perpetration of the crime. He or she who thus aids, abets or assists, advises or encourages, shall be deemed and considered as principal, and punished accordingly.’ And the inquiry is, whether proof that the prisoner was accessory to the crime before the act will sustain an indictment against him as principal. The Act says that such accessories shall be deemed and considered as principals and punished accordingly. This Act, then, makes all accessories at or before the fact, principals. The declaration that they shall be ‘deemed and considered,’ is as unequivocal an expression as if the Act had said, ‘are hereby declared to be.’ It is true, the Act states what an accessory is, but then it declares in substance that he is principal. It was in perfect harmony with the system pursued by the Legislature to go on and define what an accessory is, as it has defined all other offenses which it has attempted to enumerate, and it does not detract from the force of the provision that they shall be deemed and considered as principals. The distinction between accessories before the fact, and principals, is in fact abolished. At the common law an accessory at the fact might be indicted and convicted as principal, for the common law declares that he who stands by, advises and encourages the murderer to give the blow, gives the blow himself as much as if he held the weapon in his own hands. Our Legislature has gone one step further, and provided that he who, not being present, hath advised

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or encouraged the giving of the blow, hath given the blow as much as if he had stood by and encouraged it, or even had struck with his own hands. It is no more a fiction of law to declare that he gives the blow, by advising and encouraging it beforehand, than it is to affirm that he gives it by advising and encouraging it at the time. Both proceed upon the principle that what we advise or procure another to do, in the eye of the law, we do ourselves. All are principals, and as such, should be indicted and punished. Indeed, they must be indicted as principals or not at all, for they are declared by the Act to be principals. If they are not to be indicted as principals, the very object of the law is defeated; if they are to be indicted as accessories, they must be tried and convicted as accessories, and then they could not be tried till after the conviction of the principals; for as we have before seen, we are bound by the rules of evidence of the common law, of which that is one. Such is the inevitable consequence, unless they are indicted and tried for murder, of which the statute says they shall be deemed and considered guilty. There is no doubt but that the pleader may, if he choose, and perhaps it would be advisable to describe the circumstances of the offense as they actually transpired, as it is in an indictment against an accessory before or at the fact; but if the stating part of the indictment be that way, it should conclude as for murder, for that is really the offense of which the party is guilty, if at all. It was urged that there was a variance between the proof and the allegation. That is true in one sense, and so it is true of an indictment for murder against an accessory at the fact; so it is too of an indictment for larceny against a clerk, an apprentice, a bailee, or a lodger, for embezzlement, which is declared by our statute to be a larceny, and they are always indicted as for stealing, taking and carrying away in the usual form. They are charged with a felonious taking, when, in truth, it is only a felonious conversion; and yet it is held there is no variance, for the law declared in effect that the felonious conversion shall make the original taking felonious, although it were lawful at the time. Then, as by the law in this case, the acts of the principal

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are made the acts of the accessory, he thereby becomes the principal, and may be charged as having done the acts himself. He shall be deemed and considered as principal, and be punished accordingly. The Circuit Court decided correctly in refusing these instructions." (*Baxter v. The People*, 3 Gilman, 381.)

The case mainly relied upon to reverse the ruling of the Court below upon this point, is that of *People v. Campbell*, 40 Cal. 129. In that case the judgment was reversed here upon the point that the jury, in finding the defendant guilty of murder, had not designated the degree of the crime. In the course of the opinion in the Campbell case it was, however, assumed that the Court had already, in Trim's case, 39 Cal. 75, given an authoritative construction to the statute, and determined that one guilty as accessory before the fact could not be indicted and tried as though he were a principal; and undoubtedly such language is to be found in the opinion of the late Chief Justice, delivered in Trim's case. But the question was not involved in that case, nor even there assumed to be, for the judgment there given went distinctly upon the ground that, in the absence of the evidence upon the point, it was to be presumed that an instruction asked by the defendant was properly refused, as merely involving an abstract proposition of law. In the supplemental opinion delivered in the Campbell case, 40 Id. 141, it is expressly declared that the true rule on the subject was the one laid down in the case of Schwartz, 32 Id. 160, and on referring to that case it will be found that it was determined in favor of the prisoner principally on the distinct ground that the indictment had failed to sufficiently designate the person intended to be injured by the commission of the felony charged, though it was in effect said, in the course of the opinion, that an accessory before the fact may properly be indicted either as accessory or as a principal. These are all the cases cited by the prisoner's counsel in support of the objection relied upon in this case. Other cases, not cited, may be found looking in the same direction, but upon being looked into, they will be seen to rest upon one or the other, or all of the cases which we have thus re-examined.

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We are therefore of opinion that, under the statutes referred to, the prisoner though shown to have been only principal in the second degree within the common law definition, was properly indicted, tried and punished as a principal in the first degree, in the felony for which the indictment proceeds.

Judgment and order denying a new trial affirmed.

[No. 4,192.]

HENRY YOUNG v. SILAS M. SHINN.

CERTIFICATE OF PURCHASE OF STATE LANDS.—The Act of March 28, 1868, which provides that State certificates of purchase of land shall be received as *prima facie* evidence of title, applies to all certificates of purchase issued after the Act took effect, whether issued upon a location made before or after the passage of the Act.

IDEM.—A certificate of purchase of land, issued by the Register of State Lands before the land has been surveyed by the United States, is void.

CONTEST TO PURCHASE PUBLIC LAND.—When two parties have each an equal right to acquire public land, the one by location and purchase from the State, and the other by locating as a homestead under the laws of the United States, the party who first commences his proceedings to acquire the title has the better right.

EJECTMENT ON STATE CERTIFICATE OF PURCHASE.—The holder of a State certificate of purchase of public land, listed over to the State, can recover in ejectment, as against one who filed a homestead claim on the same in the United States Land Office, after the holder of the certificate located it.

APPEAL from the District Court, Seventh Judicial District, Sonoma County.

Action to recover the possession of the W. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of Sec. 13, Tp. 6 N. R. 7, W. Mount Diablo base and meridian, commenced May 2, 1870. The plaintiff rested his right to recover on his certificate of purchase issued by the Register of the State Land Office, on the 15th of April, 1870, on the location made by the plaintiff on the 9th day of December, 1865. The land was selected by the State as lieu land, in place of the S. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of Sec. 36, Tp.

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6 N., R. 7, W. Mount Diablo meridian. The defendant, to defeat the plaintiff's recovery, relied on his homestead claim. The plaintiff had about thirty acres of the demanded premises enclosed in 1864 by a fence, which also enclosed another tract of land on which he lived, and he cultivated it until the action was commenced.

The defendant entered on a part of the demanded premises, outside the plaintiff's enclosure in 1865, and built a house, in which he resided with his family up to the time of the trial. The plaintiff recovered judgment, and the defendant appealed. The other facts are stated in the opinion.

A. Thomas, for the Appellant.

M. Johnson, for the Respondent.

By the Court, RHODES, J.:

The lands in controversy were selected on the part of the State, and a certificate of location was issued to the plaintiff in 1863; but, as the lands had not then been surveyed by the United States, the certificate was void.

The official plat of the survey of the township was returned to the Register of the proper land office on the 28th day of November, 1865, and on the 9th day of December, 1865, the plaintiff re-located the lands; and on the 10th day of April, 1867, the lands in controversy were listed to the State. On the 15th day of April, 1870, the Register of the State Land Office issued to the plaintiff a certificate of purchase, reciting therein that it appeared from the certificate of the County Treasurer, bearing date December 9, 1865, that the plaintiff had paid twenty per cent. of the purchase-money, and the interest on the balance, etc.

The defendant claims the premises as a part of his homestead claim, taken up under the Act of Congress of May 20, 1862, and produced the receipt issued to him by the Register of the United States Land Office at San Francisco, dated December 18, 1865, for the fees required to be paid upon the filing of a homestead claim.

The fourth section of the Act of March 28, 1868 (Stats.

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1867-8, p. 508), provides that the certificate of purchase "shall be received in any Court of justice in this State as being *prima facie* evidence of title," and that provision is applicable to all certificates of purchase issued after that Act took effect.

The certificate of purchase gave the plaintiff the right of possession of the premises, unless the proceedings on his part were rendered unavailing by the homestead claim of the defendant; and conceding that the latter proved that he had taken the requisite steps to acquire a homestead, and that it would be valid and entitle him to the possession, except for the proceedings taken by the plaintiff, the question presented is; which party acquired the better right; which party would acquire the title, if each should thereafter proceed in the mode prescribed by law. The party who first commenced his proceedings to acquire the title has the better right. (*Smith v. Athearn*, 34 Cal. 506.)

The plaintiff re-located the land before the defendant filed his homestead claim, and that act secured him the better right to purchase the premises.

Judgment and order affirmed.

[No. 3,451.]

F. W. FRATT v. A. C. TOOMES.

CONSTRUCTION OF DEED.—If the owner of a Mexican grant of land makes a conveyance of a part of the same, and, in the deed, describes one boundary of the land conveyed, as running parallel with the southern line of the ranch "according to the survey of the same made by the United States Surveyor-Genereal of said State," and, at the time the deed is delivered no survey has been made and approved by the Surveyor-General, but an experimental survey had been made by the Deputy of the Surveyor-General, who had the field notes in his possession, but the grantees in the deed had no knowledge of this experimental survey, the description in the deed will be held to refer to the final survey of the ranch to be thereafter determined by the Federal authorities.

IMPLIED FINDING.—When there is no express finding upon an issue, a finding will be implied in support of the judgment, if the findings were filed before the Code of Civil Procedure took effect.

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TRANSCRIPT ON APPEAL.—The party appealing, when he relies on the statute of limitations, should see that the transcript shows when the action was commenced.

APPEAL from the District Court, Second Judicial District, Tehama County.

The facts are stated in the opinion.

J. O. Goodwin, W. C. Belcher and P. B. Nagle, for Appellant.

The plaintiff relied on an inchoate Mexican grant, a decree of confirmation, and an approved survey.

These constitute only an equitable title, and though they have been held in some cases sufficient as against naked trespassers, they have never been held sufficient against a patent.

A patent for a confirmed Mexican grant takes effect by relation from the date of the presentation of the petition for confirmation to the Board of Land Commissioners. (*Moore v. Wilkinson*, 13 Cal. 478; *Yount v. Howell*, 14 Cal. 465; *Ely v. Frisbie*, 17 Cal. 250; *Leese v. Clark*, 20 Cal. 387.)

Catlin & McFarland and *R. C. Clark*, for Respondent.

We think it needs little authority and no argument to show that the plaintiff's legal title under the elder grant must prevail in this action against the defendants, who claim under a patent founded upon a junior grant.

The patent, by the very character of the instrument itself; by the terms of the Act of Congress under which it is authorized to be issued, and by the conditions expressed upon the face of the instrument itself, is not of the least value to defendants against the plaintiff in this action. The plaintiff is one of the identical "third persons" referred to in the patent, against whom it is to have no effect whatever. (*Leese v. Clark*, 18 Cal. 537; *Teschemaker v. Thompson*, 18 Cal. 11.)

By the Court, WALLACE, C. J.:

This was an action of ejectment, and, at the trial, the

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plaintiff recovered the possession of some two hundred and fifty acres of land as being a part of the Dye Ranch. The trial was had before the Court below, sitting without a jury, and findings were filed, which were as follows:

“1. The tract of land described in the complaint, and claimed by plaintiff, is part of six leagues of land known as the ‘Rancho el Primer Canon, or Rio de Los Berrendos,’ granted by the former Mexican Government of California, to Job F. Dye, on the 22d day of May, 1844. Said grant was a valid grant, and was confirmed to said Dye by the decree of the United States District Court for the Northern District of California, on the 23d day of July, 1855, and the appeal from said decree was vacated on the 10th of February, 1857.

“2. The final survey of said Rancho Berrendos was made under and in pursuance of the Act of Congress, dated June 14, 1860, entitled ‘An Act to amend an Act entitled an Act to define and regulate the jurisdiction of the District Courts of the United States in California, in regard to the survey and location of confirmed private land claims;’ said survey is known as the ‘Tracy Survey,’ having been made in March, 1861, under instructions of United States Surveyor-General, J. W. Mandeville, by his deputy, C. C. Tracy, and was on the 5th day of April, 1861, by the decree of said United States District Court, approved as the final survey of said Rancho Berrendos.

“3. That the southern boundary line of said Rancho Berrendos, according to said Tracy survey, starts from the mouth of Antelope creek, where said creek empties into the Sacramento river, and runs from thence north forty-eight degrees, fifteen minutes east, so as to embrace within the said Rancho Berrendos only 235.20 acres of the demanded premises.

“4. The plaintiff, before the first day of October, 1866, by good and sufficient deeds of conveyance, became the grantee and owner of all the right, title and interest of said Job F. Dye, in and to the lands claimed in the complaint.

“5. The defendants entered upon the lands claimed in

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the complaint on the first day of October, 1866, and held the same adversely to him from that time to the commencement of this action, and used and occupied the same during that time, a period of one year, five and one half months.

“ 6. The rents and profits of 205 acres of said land lying within the bounds of said Tracy survey, and being a portion of the demanded premises, were worth at the rate of \$2 per acre per annum, amounting to \$598.

“ 7. On the 20th day of December, 1844, the former Mexican Government of California granted to the defendant, A. G. Toomes, five leagues of land lying on the south side of, and adjoining the tract granted as aforesaid, to said Job F. Dye. The grant to Toomes was known by the name of Rancho de los Molinos.

“ 8. On the 3d day of December, 1858, a patent, in the form authorized by the Act of Congress of March 3d, 1851, was issued to said A. G. Toomes, which said patent embraced within its boundaries all the lands claimed by the plaintiff in the complaint.”

Judgment being rendered for plaintiff in accordance with the findings, the defendants moved for a new trial, which was denied, and this appeal is taken from the judgment and order denying the motion for a new trial. The premises recovered by the plaintiff are claimed by him as being included in the rancho “Rio de los Berrendos,” otherwise called the “Antelope Ranch” or “Dye Ranch,” which was granted to Francisco Dye by Governor Micheltoreno, May 22d, 1844, and was designated as “the land known by the name of Rio de los Berrendos, adjoining the margins of the river Sacramento, the boundaries commencing at the mouth of the river Berrendos, thence north three leagues in length and two in breadth — in all, six square leagues.”

The defendants rely upon a patent of the United States issued to the defendant Toomes in the year 1858, founded upon a grant issued to Toomes in December, 1844, by Governor Micheltoreno, granting to him a tract called “Rio de los Molinos,” “commencing the boundaries at the arroyo de los Berrendos, and running south five square leagues.”

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In his petition for the grant, Toomes describes the tract solicited as follow: "The land situated on the banks of the river Sacramento, which place is vacant, and is of the extent of five square leagues, and its boundaries are, on the north, the 'Rancho of Dye' (etc.,) as appears by the accompanying map." The diseno accompanying the petition of Toomes plainly shows the position of the arroyo de los Berrendos, or Antelope creek, emptying into the Sacramento river — the mouth of which creek, it must be remembered, had already been designated in the preceding month of May, in the Dye grant, as the point from which a line extended eastwardly the distance of two leagues, formed the southern boundary of the Dye Ranch, and the southern boundary of the Dye Ranch is in that manner delineated on the diseno of Toomes; the territory immediately to the north of the line drawn east from the mouth of Antelope creek being thereon designated "Rancho de Dye." Looking at the grants of the Dye and Toomes Ranchos, and the disenos respectively attached, and which are each drawn with remarkable precision, it is plainly to be seen that the premises recovered in this action lay to the northward of a line drawn east from the mouth of Antelope creek, and are therefore clearly within the boundaries of the Dye grant, as made by Governor Micheltoreno. But irrespective of this, the premises recovered are also included within the boundaries of the Dye grant, as those boundaries were fixed by the survey of that grant, finally approved in April, 1861, by the District Court of the United States, proceeding under the Act of Congress of June 14th, 1860.

2. The defendants claim, however, that the plaintiff is estopped in this action to set up or rely upon the survey fixed by the decree of the District Court of the United States, because they say that the survey made in 1856 by the Surveyor-General (and upon which the patent to Toomes was issued in 1858) represents a boundary line agreed upon by Dye and the defendant Toomes, by which it was mutually stipulated between the parties that the northern line of the Molinos ranch, as subsequently delineated in the patent, should constitute the dividing line between the two

ranchos. But the finding of the Court below is against the defendants upon the question of fact, as to whether the alleged agreement was made; and upon looking into the evidence it is seen to have been substantially conflicting; and we cannot, under the rule, disturb the finding of the Court below.

3. It is next objected by the defendants that, even admitting that the premises recovered are to be considered as included within the boundary of the Dye grant, they are not embraced within the calls of the deed of conveyance from Dye and wife to Fratt and King, through which the plaintiff claims.

The beginning point in this deed is the mouth of the Antelope creek, at its junction with the Sacramento river; and from that point the line runs northerly, meandering with the river to a sycamore tree on its bank; the second call (omitting a reference to be noticed presently) is easterly to Antelope creek; thence up the center of the creek to a tree on its eastern bank; thence to the eastern line of the ranch; thence down the eastern line to the southeastern corner of the ranch; and thence along its southern line to the mouth of Antelope creek, the point of beginning. As there given, the deed would follow the southern line of the Dye grant, as fixed by the final survey, and would include the premises recovered; but in the second call by which the most westerly portion of the northern line is run to Antelope creek, it is mentioned as running parallel with the southern line of the ranch, "according to the survey of the same made by the United States Surveyor-General of said State." The deed bears date, and was presumptively delivered, on the 24th day of November, 1857, and the survey of the Dye ranch became final, as we have seen already, only in April, 1861. Before the delivery of the deed, however, a survey of that ranch had been made in the field by one Gray, acting under the directions of the Surveyor-General of the United States, for the time being, by which survey the southern line of the ranch was not identical with that line as appearing in the final survey referred to. If the calls of the Gray survey are to be considered as fixing the southern

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line of the Dye ranch for the purpose of the conveyance to Fratt and King, then the premises recovered are not embraced in that conveyance. It should be borne in mind that, though the field notes of the Gray survey were in existence and in the possession of Gray, when the deed to Fratt and King was delivered, no plat of that survey appears to have been seen or examined by the parties to the deed at the time it was executed, and, in fact, the earliest period at which the plat is shown to have been in existence was in the year 1858, when the field notes were approved by the Surveyor-General of the United States, who had succeeded to the office after the Gray survey had been made in the field. So far as the record discloses, the Gray survey was, at the date of the delivery of the deed, a mere experimental survey; it had never been approved by the Surveyor-General, and in this view could hardly be said to be a survey made by that officer. Again: Fratt and King, the grantees in the deed of 1857, are not shown, when they received the deed, to have had knowledge that Gray had made any survey of the ranch whatever, experimental or otherwise. Under such circumstances it would certainly be difficult to suppose that the parties intended to limit the calls of the deed by reference to the fugitive field notes of Gray, then in his pocket, or at least not appearing to have been reported or recorded, so as to be referred to with reasonable, or, in fact, any certainty whatever.

The parties, we think, intended to refer to the final survey of the ranch to be thereafter determined by the Federal authorities. The description contained in the Dye grant, and a glance at the Mexican *diseno* accompanying it, present its eastern and southern line, and, in fact, all its boundaries with such conspicuous precision as to enable the parties to practically fix for themselves in advance the lines of the survey, which would of necessity thereafter be made by the authorities of the United States. The Sacramento river formed the western boundary, which was to begin at the mouth of the Antelope Creek, and extend northerly along the river, a distance of three leagues, to a point. From the two points thus fixed, the northern and southern

boundaries were to be formed by lines drawn easterly and at right angles to the general course of the river, a distance of two leagues; and the fourth or eastern line was to be drawn parallel with the general course of the river, and at the distance of two leagues from it. The eastern and southern boundaries, to which reference was made by the parties, were therefore almost, if not quite, as definite when the deed to Fratt and King was delivered, as in 1860, when the official survey became final; and we cannot, under the circumstances, infer an intention to put them aside for the field notes of the Gray survey.

4. The last point to be considered concerns the defense, based upon the Statute of Limitations. But this is readily disposed of, because the fifth finding substantially is to the effect that when the action was brought the defendants had been in possession of the premises only one year five and a half months. If it is to be said that the finding referred to fixed these periods only for the purpose of ascertaining the amount of rents and profits to be recovered, and was not a finding upon the issue raised by the plea of the statute, then there being no express finding upon the point, a finding is to be implied against the defendants in support of the judgment the plaintiff had below, for this cause was determined in the Court below, under the practice prevailing before the taking effect of the present Code of Civil Procedure; and, finally, we have at any rate no means of determining at what time this action was commenced; for in this case, as in most others which have come here upon the plea of the Statute of Limitations, the parties seem to have been careful to omit that part of the record which would have shown when the complaint was filed.

There is nothing in the other points; and the judgment and order denying a new trial are affirmed, as of October 1st, 1872.

Remittitur forthwith.

Mr. Justice RHODES did not express an opinion.

Points decided.

[No. 3,532.]

**MARY FRANCES WARD, BY A. J. WARD, HER GUARDIAN,
AD LITEM, v. NOAH F. FLOOD, PRINCIPAL OF THE
BROADWAY GRAMMAR SCHOOL, IN THE CITY AND COUNTY
OF SAN FRANCISCO.**

MOTION FOR JUDGMENT IN MANDAMUS CASE.—A motion by the applicant for a writ of mandamus, that the writ issue notwithstanding the matters alleged in the defendant's answer, amounts to a general demurrer to the answer.

REFUSAL TO PERFORM A DUTY.—The general rule that if a party whose duty it is to perform some act, bases his refusal to perform it on some defect in the proceedings of his adversary, he will not afterwards be permitted to allege a new or additional defect, does not apply to officers whose duties are governed by law.

ADMISSION OF CHILD INTO PUBLIC SCHOOLS.—If the principal of a public graded school refuses to receive a child into the school for a reason which is not good in law, but there is a good legal reason for the refusal, the principal, on mandamus to compel him to admit such child, will not be precluded from relying on the true reason why the child should have been refused admittance.

IDEM.—A principal of a public graded school may refuse a child admission as a scholar, provided such child has not sufficient education to enter the lowest grade of such school.

PRIVILEGE OF ATTENDING PUBLIC SCHOOLS.—The privilege accorded to a child, of attending the public schools, is not a privilege appertaining to a citizen of the United States as such, nor can any person demand admission into such schools on the mere status of citizenship.

RIGHT TO ATTEND PUBLIC SCHOOLS.—The opportunity of instruction in public schools given by the statute to the youth of the State, is in obedience to the special command of the State Constitution, and the privilege thereby granted is a legal right, as much so as a vested right in property.

FOURTEENTH AMENDMENT TO U. S. CONSTITUTION.—The clause, in the XIV. Amendment to the Constitution of the United States, which forbids a State to "deny to any person within its jurisdiction the equal protection of the laws," did not create any new legal rights, but operated upon legal rights as it found them established, and declared that such as they were in each State, they should be enjoyed by all persons alike.

COLORED CHILDREN CANNOT BE EXCLUDED FROM SCHOOLS.—The Legislature cannot, while providing a system of education for the youth of the State, exclude from its benefits children, merely because of their African descent.

SEPARATE SCHOOLS FOR COLORED CHILDREN.—The law providing for the education of children of African descent in separate schools, to be provided at the public expense the same as other public schools, is not in

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conflict with the Constitution of this State, nor in conflict with the Thirteenth and Fourteenth Amendments to the Constitution of the United States.

IDEM.—When such law exists, colored children may be excluded from schools established for white children, provided schools for colored children are established, affording the same facilities for education; but if such schools for colored children are not established, they cannot be excluded from the schools kept for white pupils.

APPLICATION to the Supreme Court for writ of mandate.

The facts are stated in the opinion.

John W. Dwinelle, for the Plaintiff.

The Civil Rights Bill, passed April 9th, 1866, (14 U. S. Statutes at Large, 27,) declares all such emancipated persons born in the United States, to be citizens of the United States.

The Fourteenth Amendment of the Constitution of the United States, adopted July 13–28, 1868, (15 U. S. Statutes at Large, 709,) is in these terms:

ARTICLE XIV, Section 1.—All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the States wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction, the equal protection of the laws.

The School Law of California, passed April 4, 1870, (Laws 1869–70, p. 838,) contains the following provisions:

Section 53. Every school, unless otherwise provided by special law, shall be open for the admission of all white children between five and twenty-one years of age residing in that school district, and the Board of Trustees or Board of Education shall have power to admit adults and children not residing in the district, whenever good reasons exist for such exceptions.

Sec. 56. The education of children of African descent, and Indian children, shall be provided for in separate

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schools. Upon the written application of at least ten such children to any Board of Trustees, or Board of Education, a separate school shall be established for the education of such children; and the education of a less number may be provided for by the Trustees, in separate schools, or in any other manner.

Sec. 57. The same laws, rules and regulations, which apply to schools for white children, shall apply to schools for colored.

The Board of Education of the city and county adopted the following regulation which existed at the time when the cause of action arose in this case:

“Sec. 117. Separate schools. Children of African or Indian descent shall not be admitted into schools for white children; but separate schools shall be provided for them in accordance with the California School Law.” (*The People v. The Board of Education of Detroit*, 18 Mich. 401.)

The statutes of Michigan provided that “all residents of any school district shall have an equal right to attend any school therein; provided that this shall not prevent the grading of schools according to the intellectual progress of the pupils, to be taught in separate places when expedient.”

Held: That a mandamus would be awarded to compel the admission of a colored pupil into the public schools where white children were taught, although separate schools for colored children had been established.

Note, that the cause of action accrued in April, 1868, and before the Fourteenth Amendment was adopted, on July 21-28, 1868.

This case is therefore only a construction of the then existing laws of Michigan, and is in point in the case in hand, only as showing that “an equal right to attend any school in the district” is not secure by the establishment of colored schools.

State v. Duffy, 7 Nevada, 342; *Williams v. School Directors*, Wright, 578; *Gray v. State*, 4 Ohio, 353; *Jeffries v. Ankeny*, 11 Ohio, 376; *Thacker v. Hawk*, 11 Ohio, 371; *Chalmers v. Stewart*, 11 Ohio, 386, 387; *Lane v. Baker*, 12 Ohio, 237; *Stewart v. Southard*, 17 Ohio, 402.)

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In *Clark v. The Board of Directors, etc.*, 24 Iowa, 267, it was held that under a clause in the Constitution of that State, ordaining that "the Board of Education shall provide for the education of all the youths of the State, through a system of common schools," the Board of School Directors had no discretionary power to require colored children to attend a separate school. Before the adoption of the Thirteenth and Fourteenth Amendments to the Constitution of the United States, this decision would not, probably, have been in point in a case arising under the Constitution of the State of California, which denied to colored children any political *status* whatsoever. But since those amendments have given the political *status* of citizens to such children, when either native born or naturalized, the decision in 24 Iowa, *ut supra*, becomes an authoritative construction of the meaning of the phrase "common schools," in Article IX, sections two and three of the Constitution of California. "Common schools" does not mean "ordinary" schools. It means public, common to all, in a political sense; and the words common and public are used as equivalent terms in the constitutions and statutes of all the States. Under the decision in 24 Iowa, therefore, no child who is a citizen of California can be excluded, by reason of color or race, from any of the common or public schools of the State.

This is a case which can hardly be argued, any further than its statement alone is an argument. It is admitted now, by the highest masters of thought, even among theologians, that the existence of God himself cannot be proved, nor the duty of children to love and cherish their parents, nor that of general benevolence. But we know that God exists, and that these duties are of imperative obligation. We know that persons of African descent have been degraded by an odious hatred of caste, and that the Constitution of the United States has provided that this social repugnance shall no longer be crystallized into a political disability. This was the object of the Fourteenth Amendment, and its terms are above being the subject of criticism. We know, too, that a State must always have

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laws equal to its obligations. This was always true as a proposition of municipal law. The world is still ringing with the echoes of its announcement as a proposition of the public law of nations, by the highest tribunal that ever existed in the world, which has just closed its session at Geneva.

Williams and Thornton, for the Defendant.

The Fourteenth Amendment, while it raises the negro to the status of citizenship, confers upon the citizen no new privileges or immunities. It forbids any State to abridge by legislation any of those privileges or immunities secured to any citizen by the second section of the fourth article of the Federal Constitution. They are those great fundamental rights which belong to the citizens of every free and enlightened country, and are so defined in the decisions of all the Courts. (Cooley's Const. Lim. 15, note 3.)

The right of admission to our public schools is not one of those privileges and immunities. They were unknown, as they now exist, at the time of the adoption of the Federal Constitution; that instrument is silent upon the subject of education, and our public schools are wholly the creation of our own State Constitution and State laws.

The whole system is a beneficent State institution — a grand State charity — and surely those who create the charity have the undoubted right to nominate the beneficiaries of it.

The Fourteenth Amendment provides that "Congress shall have power to enforce, by appropriate legislation, the provisions of this Article."

Congress has exercised this power, and given us a legislative construction of this article, in accordance with that for which we contend. (U. S. Statutes, Vol. 16, p. 144, Sec. 16; Id. Vol. 14, p. 27, Sec. 1.)

But we find a full answer to this proceeding in the fact that colored children are not excluded from the public schools, for separate schools are provided for them, conducted under the same rules and regulations as those for the white, and in which they enjoy equal, and in some respects superior educational advantages.

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So far as they are concerned, no rule of equality is violated — for while they are excluded from the schools for the white, the white are excluded from the school provided for the negro. (*Vide* Act of April 4, 1870, Secs. 53–56; Swett's Report, p. 13.)

This Act of the Legislature is constitutional. The Constitution of California on this subject differs materially from most of our State Constitutions. It makes it the duty of the Legislature to "provide for a system of common schools," thus leaving that body to exercise its own discretion, and to provide such system as it deems wise and just.

The Act of April 4th, 1870, embodies that system; it is the expression of the sovereign will, and is wise, just and politic. (*Roberts v. Boston*, 5 Cush. 198, 206; *The State ex rel., etc. v. Cincinnati*, 19 O. 178, 197; *Van Camp v. Board of Education*, 9 O. State, 406, 414; *Westchester & Phil. R. R. v. Miles*, 55 Penn. 212; *People, etc., v. Board of Education*, 18 Mich. 400, 412; *State of Nev. ex rel., etc. v. Duffy*, 7 Nevada, 342; *Clark v. Board of Directors*, 24 Iowa, 272.)

Independent of all such considerations, under the police power of the State, the Legislature would have the right, by way of classification, to provide separate schools for the white and black, confining each to its appointed sphere.

This power is most comprehensive. It is inherent in every state, and inalienable. It exerts itself upon persons and property, whenever the safety and welfare of society is endangered. It is exercised for the general comfort, health and prosperity of the people, and for the preservation of the morality, peace and dignity of the commonwealth. (Cooley's Con. Lim. 572, 574, 576, note 2, 33, note 4.)

Confining colored children to schools specially organized for them, does not impair or abridge any right, conceding that the right exists; it is a simple regulation of rights, with a view to the most convenient and beneficial enjoyment of them by all, and deprives no one of what is justly his own. (Cooley's Con. Lim. 596–7.)

By the Court, WALLACE, C. J.:

This is an application made to this Court for a writ of

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mandamus directing the defendant to receive the petitioner as a scholar in the school of which he is the principal. The petition for the writ is as follows:

Harriet A. Ward, being sworn, says: "I am the mother of Mary Frances Ward, who is under the age of fourteen years — namely, of the age of between eleven and twelve years. I am the wife of A. J. Ward, and by that marriage the mother of said Mary Frances Ward. We are all of African descent, colored citizens of the United States and of the State of California, and at present, and continuously for thirteen years now last past, residents of the city and county of San Francisco, and for six months last past, and now, residing at No. 1,006 Pacific street, in the city and county of San Francisco. The city and county of San Francisco is not now, nor for the year last past has been divided into school districts; but by law, and also by the custom adopted and established by the Board of Education of said city and county, pupils residing therein have a right to be received as such at the public school nearest their residence, in case such school is not full, and they have made sufficient progress to be received therein.

"The nearest public school to our said residence in said city and county for six months now last past, and now, is the so-called Broadway Grammar School, on Broadway street, in said city and county, between Powell and Mason streets; a public school under the control of the Board of Education of said city and county, sustained by taxes raised in said city and county for the support of public schools therein, and at the time the application hereinafter mentioned was made, was, and ever since then has been, and is now, in charge of Noah F. Flood as Principal thereof, appointed thereto by, and holding office as such under the said Board of Education.

"On or about the 1st day of July, A. D. 1872, by the consent and direction of my said husband, I took the said Mary Frances Ward with me to the said Broadway Grammar School, the same being in session, and there found the said Noah F. Flood, then and there being such Principal of said school, and then and there as such being the proper and only

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person to whom to make application for the admission of pupils to the same, and presented her to him, as a pupil asking to be admitted as such to said school. The said school then and there was not full, nor was there any good or lawful reason why the said Mary Frances Ward should not be received therein as such pupil, as aforesaid. But the said Noah F. Flood, instead of making inquiries respecting the said Mary Frances Ward, her residence, citizenship, or in any other respect, or examining her as to her proficiency, at once politely, but firmly and definitively declined to entertain the said application, or to admit the said Mary Frances Ward as such pupil, assigning, as the only reason for such action and refusal, the fact that she was a colored person, and that said Board of Education had established and assigned separate schools for such colored persons, and that he was sorry to be compelled for that reason to adopt that course of action on his part. And I aver that the reason so assigned was true in fact, and was in truth and fact the only reason existing for such action and refusal of the said Noah F. Flood.

“The said Broadway Grammar School was then and is now of the description called a graded school, which signifies that the pupils in it are classified into several distinct grades, according to the instruction which they may respectively require; those of the lowest grade receiving instructions nearly of a primary character; and those of the highest grade receiving instruction of a somewhat thorough character in arithmetic, grammar, and other studies. The said Mary Frances Ward, at the time of said application, had already received sufficient instruction to enable her to enter the lowest grade of said grammar school, but not the highest grade.

HARRIET A. WARD.”

The answer of the defendant is as follows:

“Now comes Noah F. Flood, and for his answer in the above entitled action or proceeding, admits that he is and was on or about the 1st day of July, 1872, the Principal of the Broadway Grammar School, in the city and county of San Francisco; admits that Harriet A. Ward, in said action or proceeding mentioned, is the mother of Mary

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Frances Ward, a minor under the age of fourteen years, and that she is the wife of A. J. Ward; admits that petitioner and her said mother and father are of African descent, and colored citizens of the United States, and admits their residence as stated in the affidavit of Harriet A. Ward in said action or proceeding; admits that the said city and county of San Francisco is not now, nor for the year last past has been divided into school districts; and admits that by law, and also by the custom adopted and established by the Board of Education of said city and county, white pupils residing therein have a right to be received as such at the public school nearest their residence, in case such school is not full, and they have made sufficient progress to be received therein, but denies that children of African descent have a right to be admitted into any public school other than those separately organized and provided for them.

“Further answering, said defendant admits that the nearest public school to the residence of petitioner has been for six months last past, and now is, the said Broadway Grammar School; and admits that the same is a public school under the control of the Board of Education of said city and county, sustained by taxes raised in said city and county for the support of public schools therein, and was on or about the 1st day of July, 1872, and ever since has been, and now is, in charge of this defendant, as Principal thereof, appointed thereto by, and holding office as such under the said Board of Education.

“He admits that on or about the 1st day of July, 1872, the said Harriet A. Ward, by the consent and direction of her said husband, took the petitioner with her to the said Broadway Grammar School, and that the same was then in session; that said Harriet then and there presented the said petitioner to this defendant as a pupil asking to be admitted as such to said school, this defendant then and there being such Principal as aforesaid. He admits that said school was not then and there full, but denies that there was no good or lawful reason why said petitioner should not be received in said school as said pupil as aforesaid, and denies

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that he had any right or authority to admit her as such pupil, or that she had any right to be admitted as such pupil; but on the contrary, avers that there was a good and sufficient reason in this, that he was appointed as such Principal by the said Board of Education, and in refusing to receive the petitioner as a pupil, he acted under and in accordance with the rules and regulations adopted and prescribed by the said Board, one of which is as follows:

‘Sec. 117. Separate Schools.—Children of African or Indian descent shall not be admitted into schools for white children, but separate schools shall be provided for them in accordance with the California School Law.’

“And this defendant avers that in accordance with said rule and the Act of the Legislature therein referred to, entitled ‘an Act to amend an Act to provide for a system of common schools,’ approved April 4th, 1870, two separate schools were and are provided for colored children, with able and efficient teachers, and which afford equal advantages and are conducted under the same rules and regulations as those provided for the education of white children.

“Further answering, defendant admits that the said Broadway Grammar School was then and is now of the description called a graded school, which signifies that the pupils in it are classified into distinct grades, according to the instruction which they may respectively require; but this defendant avers that the lowest grade in said Grammar school then was and now is the sixth grade, into which the petitioner had not received sufficient instruction to enable her to enter; and further avers that the said Mary Frances Ward, was, prior to and at the time of her said application, and now is a member of and pupil in a school provided for colored children or children of African descent, under the said Act of the Legislature of the State of California, and in the seventh grade of said school.

“And this defendant further avers that the said Mary Frances, in applying for admission into the said Broadway Grammar School, did not present to him as the Principal thereof, any certificate of transfer, as required by the said rules and regulations as adopted by the said Board of Education, one of which rules is as follows:

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“‘Sec. 134. Transfers—Pupils desiring to be transferred from one school to another shall apply to their principal for a certificate, which shall state their name, age, grade, scholarship, deportment, residence and cause of transfer.’

“And now, having fully answered, the said defendant asks that the prayer of petitioner be denied, and that said defendant be hence dismissed, with judgment for his costs in this proceeding incurred.”

The case was submitted for decision upon these pleadings of the respective parties.

1. The motion that the writ issue, notwithstanding the matters alleged in the answer of the defendant, amounts to a general demurrer to the answer. It necessarily assumes that the matters set up in the answer, though true in point of fact, do not in law amount to a defense against the application for the writ. It is averred in the petition, and admitted in the answer, that the Broadway Grammar School, into which the petitioner seeks to be admitted as a pupil, is a graded school—that is to say, a school in which the pupils are classified into several distinct grades, “according to the instruction which they may respectively require,” and the answer thereupon avers “that the lowest grade in said Grammar School then was, and now is, the sixth grade, into which the petitioner had not received sufficient instruction to enable her to enter.” It being, therefore, necessarily admitted for the purposes of this motion, that the attainments of the petitioner, in point of learning, were not sufficient to entitle her to be admitted in any class, even the lowest in the school, it would hardly require an argument to show that the defendant, as Principal of the school, correctly denied her application to be received as a pupil. It is claimed for the petitioner, however, that the refusal of the defendant not having been placed on that ground, but on the sole ground that the petitioner was a colored person, the defendant cannot now be permitted to set up the fact that she was not sufficiently advanced in learning to entitle her to be admitted.

There is no doubt that if a party, upon tender or demand made, or other proceeding *en pais*, had put his refusal upon

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some particular omission or defect in the proceedings of his adversary, he will not afterwards be permitted, in support of such refusal, to allege a new or additional defect or insufficiency in those proceedings, especially if such defect or insufficiency be of such a character as that it might have been cured if it had been pointed out or relied upon at the time. This is the ordinary and general rule, and it proceeds upon the idea that, having specially designated one or more supposed insufficiencies, the party thereby waives and abandons all others.

But it is obvious that this rule can have no just application to the case now under consideration. If the law, under the circumstances actually appearing in the record before us, forbade the respondent, as the Principal of the school, to admit the petitioner as a pupil therein, the circumstance that the respondent put his refusal on an untenable ground ought not, in this proceeding, to preclude an examination into the very right of the case. The claim of the petitioner to be admitted, and the corresponding duty of the defendant to admit her as a pupil, are governed by law; and if it appear, as it does unquestionably appear, upon the record before us, that she did not possess the acquirements, in point of learning, sufficient to entitle her, whatever her color, to be admitted to any class in the school, even the lowest, then the respondent must be considered to have correctly refused to entertain her application for admission, and the legal sufficiency of the particular reason assigned by him for such refusal becomes wholly immaterial.

The writ of mandamus is issued to compel the admission of a party to the enjoyment of a substantial right, from which he is unlawfully precluded; and it is necessary that the record should manifest the right claimed, as well as the unlawful preclusion of the petitioner from the enjoyment of that right. Failing in either of these respects, the writ must be denied, for we know of no principle upon which we ought to compel the defendant to entertain the application of the petitioner here, when it appears to us by the record that, should he do so, it will then become his plain

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duty to again decline to admit her. Upon this view, the application for the writ must fail.

2. But we do not intend to put the decision of the case upon this point alone. We will, therefore, assume for this purpose, that the petitioner was sufficiently advanced in her studies to entitle her to enter some one of the classes of this school; and further, that upon her application for admission as a pupil, she presented the certificate required by the 134th rule of the Board, and also, that the only ground upon which she was denied admission to the school was that she was a child of African descent. These assumptions lead us to inquire whether, under the circumstances appearing, the respondent is justified by law in refusing to admit her. We say under the circumstances appearing, because it is shown by the record that in San Francisco separate schools are not only authorized by law, but are in fact maintained for the education of colored children, "with able and efficient teachers, and which afford equal advantages and are conducted under the same rules and regulations as those provided for the education of white children;" and because it also appears that the petitioner, at the time when she made application to be admitted into the Broadway Grammar School, was a pupil in attendance upon another public school conducted in San Francisco for the education of children of her color, which school, like the Broadway Grammar School, was a graded school, she being a pupil of the seventh grade or class therein. Recurring then to the inquiry whether the refusal of the respondent to admit the petitioner to the school under his charge is justified by the law, it will be seen that the statute of the State (Acts 1869-70, Sec. 56), enacts in terms that "the education of children of African descent, and Indian children, shall be provided for in separate schools," and if the statute be itself free from objection of a constitutional character, it is evidently a sufficient authority for the one hundred and seventeenth rule of the Board already recited, and in this view the respondent was not only justified in excluding the petitioner from the school in his charge, but in the face of the statute and the rule referred to, he had no

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discretion to admit her as a pupil therein. It is not claimed by the learned counsel for the petitioner, as we understand him, that the statute in question is forbidden by the Constitution of the State. The argument is that the exclusion of the petitioner from this particular school is contrary to the Thirteenth and Fourteenth Amendments of the Federal Constitution lately adopted. We are, however, unable to perceive in what way it is to be maintained that the State law or the action of the respondent thereunder are in contravention of the Thirteenth Amendment referred to, by which Amendment slavery and involuntary servitude are forbidden. It would seem, indeed, too plain to require argument, that the mere exclusion of the petitioner from this particular school, does not assume to remit her to a condition of slavery or involuntary servitude, in the sense of the Constitution, or in any sense at all; or that there is any — even the slightest — relation between the case here and the prohibition contained in the Amendment referred to.

Nor is it perceived that the State law in question, in obedience to which the respondent proceeded, is obnoxious to those provisions of the Fourteenth Amendment to the Federal Constitution securing the privileges and immunities of citizens of the United States, and protecting all persons against the deprivation of life, liberty or property, without due process of law. That Amendment, so far as claimed to be material to the question, is as follows: "No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States. Nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

It will indeed be readily conceded that the privilege accorded to the youth of the State, by the law of the State, of attending the public schools maintained at the expense of the State, is not a privilege or immunity appertaining to a citizen of the United States as such; and it necessarily follows, therefore, that no person can lawfully demand admission as a pupil in any such school because of the mere status of citizenship; and it is perhaps hardly necessary to add that assuredly no

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person can be said to have been deprived of either life, liberty or property, because denied the right to attend as a pupil at such schools, however obviously insufficient and untenable be the ground upon which the exclusion is put.

The last clause of so much of the Amendment as has been recited, however, forbids the State to "deny to any person within its jurisdiction the equal protection of the laws," and it remains to inquire if the statute of the State, providing for a system of common schools, in so far as it directs that schools shall be maintained for the education of colored children separate from those provided for the education of white children, be obnoxious to this portion of the Federal Constitution.

The opportunity of instruction at public schools is afforded the youth of the State by the statute of the State, enacted in obedience to the special command of the Constitution of the State, directing that the Legislature shall provide for a system of common schools, by which a school shall be kept up and supported in each district, at least three months in every year, etc. (Art. 19, Sec. 3.) The advantage or benefit thereby vouchsafed to each child, of attending a public school is, therefore, one derived and secured to it under the highest sanction of positive law. It is, therefore, a right — a legal right — as distinctively so as the vested right in property owned is a legal right, and as such it is protected, and entitled to be protected by all the guarantees by which other legal rights are protected and secured to the possessor.

The clause of the Fourteenth Amendment referred to did not create any new or substantive legal right, or add to or enlarge the general classification of rights of persons or things existing in any State under the laws thereof. It, however, operated upon them as it found them already established, and it declared in substance that, such as they were in each State, they should be held and enjoyed alike by all persons within its jurisdiction. The protection of law is indeed inseparable from the assumed existence of a recognized legal right, through the vindication of which the protection is to operate. To declare, then, that each

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person within the jurisdiction of the State shall enjoy the equal protection of its laws, is necessarily to declare that the measure of legal rights within the State shall be equal and uniform, and the same for all persons found therein—according to the respective condition of each—each child as all other children—each adult person as all other adult persons. Under the laws of California children or persons between the ages of five and twenty-one years are entitled to receive instruction at the public schools, and the education thus afforded them is a measure of the protection afforded by law to persons of that condition.

The education of youth is emphatically their protection. Ignorance, the lack of mental and moral culture in earlier life, is the recognized parent of vice and crime in after years. Thus it is the acknowledged duty of the parent or guardian, as part of the measure of protection which he owes to the child or ward, to afford him at least a reasonable opportunity for the improvement of his mind and the elevation of his moral condition, and, of this duty, the law took cognizance long before the now recognized interest of society and of the body politic in the education of its members had prompted its embarkation upon a general system of education of youth. So a ward in chancery, as being entitled to the protection of the Court, was always entitled to be educated under its direction as constituting a most important part of that protection. The public law of the State—both the Constitution and Statute—having established public schools for educational purposes, to be maintained by public authority and at public expense, the youth of the State are thereby become *pro hac vice* the wards of the State, and under the operations of the constitutional amendment referred to, equally entitled to be educated at the public expense. It would, therefore, not be competent to the Legislature, while providing a system of education for the youth of the State, to exclude the petitioner and those of her race from its benefits, merely because of their African descent, and to have so excluded her would have been to deny to her the equal protection of the laws within the intent and meaning of the Constitution.

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But we do not find in the Act of April, 1870, providing for a system of common schools, which is substantially repeated in the Political Code now in force, any legislative attempt in this direction; nor do we discover that the statute is, in any of its provisions, obnoxious to objections of a constitutional character. It provides in substance that schools shall be kept open for the admission of white children, and that the education of children of African descent must be provided for in separate schools.

In short, the policy of separation of the races for educational purposes is adopted by the legislative department, and it is in this mere policy that the counsel for the petitioner professes to discern "an odious distinction of cast, founded on a deep-rooted prejudice in public opinion." But it is hardly necessary to remind counsel that we cannot deal here with such matters, and that our duties lie wholly within the much narrower range of determining whether this statute, in whatever motive it originated, denies to the petitioner, in a constitutional sense, the equal protection of the laws; and in the circumstances that the races are separated in the public schools, there is certainly to be found no violation of the constitutional rights of the one race more than of the other, and we see none of either, for each, though separated from the other, is to be educated upon equal terms with that other, and both at the common public expense. A question similar to this came before the Supreme Judicial Court of the State of Massachusetts in 1849 (*Roberts v. The City of Boston*, 5 Cushing R. 198), and was determined by the Court in accordance with the views just expressed by us. That was an action on the case brought by a colored child against the city to recover damages claimed by reason of her exclusion from a public school as a pupil. It appeared that primary schools to the number of about one hundred and sixty were maintained for the instruction of children of both sexes between five and seven years of age, and that of these schools two were appropriated to the exclusive instruction of colored children, and the residue to the exclusive instruction of white children. It also appeared that the plaintiff had been excluded from the

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primary school nearest her father's residence, which was a school devoted exclusively to the instruction of white children, and that the school appropriated to the education of colored children nearest her father's residence was about a fifth of a mile more distant therefrom than was the school from which she had been excluded. The Constitution of the State of Massachusetts contained the following clauses, which were relied upon by the counsel for the plaintiff to show that the separation of colored from white children for educational purposes was not justified by law. (Part 1, Art. 1:) "All men are born free and equal, and have certain natural, essential and inalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties, that of acquiring, possessing and protecting property; in fine, that of seeking and obtaining their safety and happiness. Art. 6: No man nor corporation or association of men, have any other title to obtain advantages or particular and exclusive privileges distinct from those of the community, than what arise from consideration of services rendered to the public." * * *

It will be seen that the language of the Massachusetts Constitution prohibiting "particular and exclusive privileges," was fully as significant, to say the least, in its bearing on the general question in hand as is that of the Fourteenth Amendment of the Federal Constitution, securing "the equal protection of the laws."

The argument of the counsel for the plaintiff in the Massachusetts case, much like that of the counsel for the petitioner here, was that the separation of the races for educational purposes, "is the occasion of inconveniences to colored children, to which they would not be exposed if they had access to the nearest public schools; it inflicts upon them the stigma of caste; and although the matters taught in the two schools may be precisely the same, a school exclusively devoted to one class must differ essentially, in its spirit and character, from that public school known to the law, where all classes meet together in equality."

The opinion of the Court, delivered by Mr. Chief Justice

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SHAW, maintained the rightful authority of the school committee, to separate the colored children from the white children in the public schools of the city of Boston, and in the course of the opinion, the learned Chief Justice remarked as follows: "It will be considered that this is a question of power, or of the legal authority of the committee intrusted by the city with this department of public instruction; because if they have the legal authority, the expediency of exercising it in any particular way is exclusively with them. The great principle advanced by the learned and eloquent advocate of the plaintiff, is that by the Constitution and laws of Massachusetts, all persons, without distinction of age or sex, birth or color, origin or condition, are equal before the law. This, as a broad general principle, such as ought to appear in a declaration of rights, is perfectly sound; it is not only expressed in terms, but pervades and animates the whole spirit of our Constitution of free government. But when this great principle comes to be applied to the actual and various conditions of persons in society, it will not warrant the assertion that men and women are legally clothed with the same civil and political powers, and that children and adults are legally to have the same functions and be subject to the same treatment; but only that the rights of all, as they are settled and regulated by law, are equally entitled to the paternal consideration and protection of the law, for their maintenance and security. What those rights are, to which individuals in the infinite variety of circumstances by which they are surrounded in society, are entitled, must depend on laws adapted to their respective relations and conditions.

"Conceding, therefore, in the fullest manner, that colored persons, the descendants of Africans, are entitled by law, in this commonwealth, to equal rights, constitutional and political, civil and social, the question then arises whether the regulation in question, which provide separate schools for colored children, is a violation of any of these rights.

"Legal rights must, after all, depend upon the provisions of law; certainly all those rights of individuals which can

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be asserted and maintained in any judicial tribunal. The proper province of a declaration of rights and constitution of government, after directing its form, regulating its organization and the distribution of its powers, is to declare great principles and fundamental truths, to influence and direct the judgment and conscience of legislators in making laws, rather than to limit and control them, by directing what precise laws they shall make. The provision that it shall be the duty of legislatures and magistrates to cherish the interest of literature and the sciences, especially the University of Cambridge, public schools and grammar schools in the towns, is precisely of this character. Had the Legislature failed to comply with this injunction, and neglected to provide public schools in the towns; or should they so far fail in their duty as to repeal all laws on the subject, and leave all education to depend on private means, strong and explicit as the direction of the Constitution is, it would afford no remedy or redress to the thousands of the rising generation, who now depend on these schools to afford them a most valuable education, and an introduction to useful life. * * * * The power of general superintendence vests a plenary authority in the committee to arrange, classify and distribute pupils, in such a manner as they think best adapted to their general proficiency and welfare. If it is thought expedient to provide for very young children, it may be that such schools may be kept exclusively by female teachers, quite adequate to their instruction, and yet whose services may be obtained at a cost much lower than that of more highly qualified male instructors. So, if they should judge it expedient to have a grade of schools for children from seven to ten, and another for those from ten to fourteen, it would seem to be within their authority to establish such schools. So, to separate male and female pupils into different schools. It has been found necessary, that is to say, highly expedient, at times, to establish special schools for poor and neglected children, who have passed the age of seven, and have become too old to attend the primary school, and yet have not acquired the rudiments of learning to enable them to enter the ordinary schools. If a class

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of youth, of one or both sexes, is found in that condition, and it is expedient to organize them into a separate school, to receive the special training adapted to their condition, it seems to be within the power of the superintending committee to provide for the organization of such special school. * * * In the absence of special legislation on this subject, the law has vested the power in the committee to regulate the system of distribution and classification; and when this power is reasonably exercised, without being abused or perverted by colorable pretences, the decision of the committee must be deemed conclusive. The committee, apparently upon great deliberation, have come to the conclusion that the good of both classes of schools will be best promoted by maintaining the separate primary schools for colored and for white children, and we can perceive no ground to doubt that this is the honest result of their experience and judgment. It is urged that this maintenance of separate schools tends to deepen and perpetuate the odious distinction of caste, founded on a deep-rooted prejudice in public opinion. This prejudice, if it exists, is not created by law, and probably cannot be changed by law. Whether this distinction and prejudice, existing in the opinion and feelings of the community, would not be as effectually fostered by compelling colored and white children to associate together in the same schools, may well be doubted; at all events, it is a fair and proper question for the committee to consider and decide upon, having in view the best interests of both classes of children placed under their superintendence; and we cannot say that their decision upon it is not founded on just grounds of reason and experience, and in the results of a discriminating and honest judgment."

We concur in these views, and they are decisive of the present controversy. In order to prevent possible misapprehension, however, we think proper to add that in our opinion, and as the result of the views here announced, the exclusion of colored children from schools where white children attend as pupils, cannot be supported, except under the conditions appearing in the present case; that is,

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except where separate schools are actually maintained for the education of colored children; and that, unless such separate schools be in fact maintained, all children of the school district, whether white or colored, have an equal right to become pupils at any common school organized under the laws of the State, and have a right to registration and admission as pupils in the order of their registration, pursuant to the provisions of subdivision fourteen of section 1,617 of the Political Code.

Writ of mandamus denied.

McKINSTRY, J., concurring specially:

I concur in the judgment on the ground first considered in the opinion of the Chief Justice.

Mr. Justice RHODES did not express an opinion.

APRIL TERM, 1874.

(10)

REPORTS OF CASES

DETERMINED IN

THE SUPREME COURT

APRIL TERM, 1874

[No. 10,073.]

THE PEOPLE v. AH FAT.

AFFIDAVIT FOR CONTINUANCE.—An affidavit for a continuance in a criminal case, on the ground of the absence of a witness, should distinctly state the facts to which the absent witness would testify.

IDEM.—Query? In such case would a reference in the affidavit to the reporter's notes of the testimony taken on a former trial, be sufficient?

IDEM.—An affidavit for a continuance in a criminal case is insufficient, if it fails to show that the testimony of the absent witness can be procured at the next or a succeeding term or if it shows that the same facts desired to be proved by the absent witness can be proved by other witnesses.

AIDING TO COMMIT MURDER MAKES ONE PRINCIPAL.—If an indictment for murder charges the defendant with having been the actual perpetrator of the crime, he can be convicted if it is proved that he was present aiding and abetting the killing.

WHAT CONSTITUTES MURDER.—A person is not guiltless of murder, because the one he kills has already been mortally wounded.

INSTRUCTIONS IN CRIMINAL CASE.—If a defendant is charged in an indictment for murder with having committed the act, and there is testimony tending to show that he was the principal, and also testimony tending to show that he stood by aiding and assisting, an instruction to the jury which ignores the possible guilt of the defendant as a present aider and abettor of the killing, should not be given.

EVIDENCE OF CHARACTER OF WITNESS.—If a defendant introduces evidence on a trial for murder, tending to show that one of the people's

Statement of Facts.

witnesses was suborned, and had been paid for his testimony, the prosecution in rebuttal may introduce testimony to show the good character of the witness, for truth and veracity.

APPEAL from the District Court, Sixth Judicial District, County of Sacramento.

The defendant was indicted jointly with Ah Wee and Ah Moy, for the murder of Ah Quong. The indictment charged the three as principals.

The trial was called in October, 1873, and the defendant moved for a continuance on the ground of the absence of T. W. Gilmer, a witness who had testified at a former trial. The affidavit for a continuance did not state what Gilmer could testify to, but referred to the reporter's notes of the testimony given by Gilmer on the former trial. The testimony had been taken down by an official reporter of the Court, and Gilmer, in his testimony, gave the names of many other persons who were present, and saw and heard what he saw and heard. There was testimony tending to show that the deceased was injured, not only by a pistol shot, but also by a blow given by a hatchet. The defendant asked the Court to instruct the jury that if they believed "that before Ah Quong, the deceased, was cut with a hatchet, he had been mortally wounded by a pistol shot not fired by the defendant," then they should find him not guilty. The defendant also asked the Court to instruct that "if the jury have a reasonable doubt as to the cause of the death of the deceased, the defendant is entitled to the benefit of such doubt; and they will acquit the defendant if his death was caused by a pistol shot, not administered by defendant, nor by any one to whose act he was only an accessory." These were instructions thirteen and fourteen, and were refused by the Court.

On the trial, the prosecution called L. P. Gilman as a witness, and proved by him that he was near the place of the homicide, and heard a pistol shot, and ran to the spot and saw a crowd of Chinamen, and saw one Chinaman come from the crowd with a hatchet in his hand, and run down an alley and disappear. Gilman identified the defendant,

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Ah Fat, as the man. The defense called E. Dole, who was a policeman at the time of the homicide, and who testified that soon after the killing, and while the officers were trying to identify the man who ran down street with a hatchet, Gilman came to him frequently, and asked if there was any coin in it, and said he could identify the man who ran down Third street with the hatchet, if there was any coin in it; and asked which party of Chinese had the most money, and asked Dole to send one of the Chinese to him. In rebuttal, the prosecution called witnesses to establish the character of Gilman for truth and veracity. The defendant was convicted of murder in the second degree and sentenced to imprisonment for life, and appealed.

Jo. Hamilton and J. C. Goods, for the Appellant.

Attorney-General Love and S. Solon Holl, for the People.

By the Court, NILES, J.:

1. The affidavit for continuance on the ground of the absence of the witness Gilmer was defective in several particulars. It does not distinctly state the facts to which the absent witness would testify. If a mere reference to the reporter's notes of Gilmer's testimony could be received as supplying the place of such statement in the affidavit, this testimony clearly shows that a number of other persons were present and witnessed the occurrences to which the witness deposed. We must presume that it was apparent to the Court that the testimony of these persons was attainable, as most of them were present, and testified at the trial. Moreover, the affidavit entirely fails to show that the testimony of the absent witness could be procured at the next, or any succeeding term of the Court. We can perceive no abuse of the discretion of the Court in the refusal of a continuance under these circumstances.

2. There was no error in the instruction of the Court that if the jury believed from the evidence "that the defendant was present at the time of the killing, and unlawfully and with malice aforethought committed the deed himself, or

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aided and abetted in the killing, they should find him guilty."

The latter portion of the instruction is objected to upon the ground that, as the indictment charged the defendant with having been the actual perpetrator of the crime, it was error to instruct that he could be convicted upon mere proof that he was present, aiding and abetting the killing. This question was considered in the case of *The People v. Outerwas*, ante p. 19, and was determined adversely to the position taken by the appellant.

3. The thirteenth instruction asked by the counsel for the defendant was properly refused. The jury would have been informed substantially that a defendant is not guilty of murder in the killing of a person who has already been mortally wounded by another — a doctrine which cannot be seriously contended for. Moreover, both this instruction and the fourteenth, asked by the defendant, were radically defective, because they ignored the possible guilt of the defendant as a present aider and abetter of the killing.

4. There was no error in the admission of evidence of the character of the witness Gilman for truth and veracity. This evidence was authorized by the preceding testimony of the defendant's witness, Dole. If this testimony had been directed to mere proof of contradictory statements of Gilman upon matters relevant to the issues being tried, the propriety of evidence of character to sustain Gilman's testimony would have been, to say the least, questionable, although authorities may be found in support of its admissibility. (Greenleaf on Ev., Sec. 469, and note 4.) But Dole's testimony went further than this. The conversation narrated by him was upon matters entirely irrelevant to the issues, and could have had no other effect than to induce the belief in the minds of the jury that Gilman was a suborned witness and unworthy of credit. It was as effectual an attack upon his character for truth as if his reputation in this respect had been assailed by direct inquiries; and we can see no good reasons for allowing proof of good character in the latter case, that does not apply as well in the case before us.

Statement of Facts.

Several minor points were made by the counsel for appellant, which we do not deem it necessary to consider at length. We find no error in the record which calls for a reversal.

Judgment and order affirmed.

Mr. Justice RHODES did not express an opinion.

[No. 3,855.]

THE CENTRAL PACIFIC RAILROAD COMPANY v.
MARTIN CORCORAN, TAX COLLECTOR OF SANTA
CLARA COUNTY.

ENJOINING SALE FOR TAX.—An injunction will not be granted to restrain the collection of a tax by a sale of the real estate of the taxpayer.

APPEAL from the County Court, Twentieth Judicial District, Santa Clara County.

The plaintiff was the owner of a railroad, extending from the city of San José, county of Santa Clara, through the counties of Alameda, San Joaquin, Sacramento, Placer and Nevada, to the eastern boundary of the State, and thence to Ogden, in the Territory of Utah. Eight and $\frac{1}{2}$ miles of its road was in the county of Santa Clara, which was assessed for the fiscal year 1872–3 at \$7,000 per mile. The complaint contained several allegations of irregularity in the assessment, and of errors committed by the Boards of Supervisors in the several counties, in equalizing the assessments on the railroad. It was alleged concerning the Assessors, “that in making their assessment, they did not assess the right of way separately as land consisting of so many acres of such or such a value per acre. Nor did they describe it by reference to township, or range, or section, or fractional section, or by meets and bounds, or by other description, except as hereinafter stated. Nor did they assess separately the improvement, or iron and ties constituting said superstructure as improvements of such or such a

Argument for Appellant.

value, according to the cash value of said ties and iron. Nor did they value said lands at their cash value as lands, or as of the same value as other adjoining lands of like quality. On the contrary, they assessed said right of way and superstructure together as constituting one thing, and described them as so many miles of railroad of such or such a value per mile, without regard to the width of the right of way."

The closing allegations of the complaint were as follows:

Wherefore said plaintiff charges that the assessment made in said county of Santa Clara was and is illegal, yet the same has come into and now is in the hands of said defendant for collection by forced sale of so much of said road as lies in his county, and he will sell the same at public auction pursuant to the statute in such case made and provided, and will give to the purchaser thereof a certificate of sale, and in due time thereafter a deed thereof which will be conclusive evidence of the validity of said assessment and the regularity of all proceedings thereon, unless he be enjoined from so doing by the order of this Court.

The Court granted a preliminary injunction, but, on motion of the defendant, on the 29th day of May, 1873, dissolved it.

The plaintiff appealed from the order dissolving the injunction.

S. W. Sanderson, for Appellant, argued that the description of the property was fatally defective in the assessment.

He also argued that an injunction would lie to prevent a tax sale; and that whether a tax sale would be enjoined or not depended mainly upon the effect given to such sale by the statute under which it was to be made.

That taxes were liens upon the real property of the taxpayer, not only such as were assessed upon the real estate, but such also as were assessed upon his personal property, and cited Secs. 3716, 3717 and 3718 of the Political Code which read as follows:

"3716. Every tax has the effect of a judgment against the person, and every lien created by this title has the force

Argument for Appellant.

and effect of an execution duly levied against all the property of the delinquent; the judgment is not satisfied nor the lien removed until the taxes are paid, or the property sold for the payment thereof.

“3717. Every tax due upon personal property is a lien upon the real property of the owner thereof from and after the time the personal property is assessed.

“3718. Every tax upon real property is a lien against the property assessed, and every tax due upon improvements upon real estate assessed to others than the owner of the real estate, is a lien upon the land and improvements; which several liens attach as of the first Monday in March in each year.”

He also argued that a tax sale of real estate cast a cloud upon the title of the owner, as after providing that the Tax collector shall give the purchaser a certificate of sale, the Political Code continued as follows:

“3779. On filing the certificate with the County Recorder, the lien of the State vests in the purchaser, and is only divested by the payment to him, or to the County Treasurer for his use, of the purchase-money, and fifty per cent. thereon.

“3785. If property is not redeemed within twelve months from the sale, the Collector must make to the purchaser or his assignee a deed of the property, reciting in the deed substantially the matters contained in the certificate, and that no person redeemed the property during the time allowed by law for its redemption.

“3786. The matters recited in the certificate of sale must be recited in the deed, and such deed duly acknowledged or proved is primary evidence that:

- “1. The property was assessed as required by law;
- “2. The property was equalized as required by law;
- “3. The taxes were levied in accordance with law;
- “4. The taxes were not paid;
- “5. At a proper time and place, the property was sold as prescribed by law, and by the proper officer;
- “6. The property was not redeemed;
- “7. The person who executed the deed was the proper officer;

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“ 8. Where the real estate was sold to pay taxes on personal property, that the real estate belonged to the person liable to pay the tax.

“ 3787. Such deed, duly acknowledged or proved, is (except as against actual fraud) conclusive evidence of the regularity of all other proceedings, from the assessment by the Assessor, inclusive, up to the execution of the deed.

“ 3788. The deed conveys to the grantee the absolute title to the lands described therein, free of all incumbrances, except when the land is owned by the United States, or this State, in which case it is primary evidence of the right of possession.

“ 3789. The assessment book, duplicate assessment book, or delinquent list, or a copy certified by the County Auditors showing unpaid taxes against any person or property, is primary evidence of the assessment, the property assessed, the delinquency, the amount of taxes due and unpaid, and that all the forms of law in relation to the assessment and levy of such taxes have been complied with.”

That by the term “primary evidence” here used, was meant evidence “which sufficed for the proof of a particular fact, until contradicted and overcome by other evidence.” (Code of Civil Procedure, Sec. 1833.)

That in view of the foregoing provisions of the statute, there could be no question but that a deed for taxes would cloud a title.

That the true test by which the question whether a deed would cast a cloud upon the title of the plaintiff must be determined, was this: Would the owner of the property, in an action of ejectment brought by the adverse party, founded upon the deed, be required to offer evidence to defeat a recovery. If such proof would be necessary, the cloud would exist; if the proof would be unnecessary, no shade would be cast by the presence of the deed. He cited *Pixley v. Huggins*, 15 Cal. 133-4; *Wiggin v. Mayor, etc., of New York*, 9 Paige, 23; *Livingston v. Hollenbeck*, 4 Barb. 16; *Thompson v. Lynch*, 29 Cal. 189; *Hager v. Shindler*, 29 Cal. 47; *Arrington v. Liscom*, 34 Cal. 365.

That until the recent decision in the case of the *Savings*

Argument for Respondent.

and Loan Society v. Austin, 46 Cal. 415, such had been the settled law of this Court, and cited *Palmer v. Boling*, 8 Cal. 389; *Fremont v. Boling*, 11 Cal. 380; *Pixley v. Huggins*, 15 Cal. 127; *Cowell v. Washburn*, 22 Cal. 519; *Ritter v. Patch*, 12 Cal. 298; *Hibernia Savings and Loan Society v. Ordway*, 38 Cal. 679; *Guy v. Hermance*, 5 Cal. 73.

J. C. Black, for Respondent.

The complaint in this cause does not contain sufficient averments to constitute a proper case for the equitable interposition of the Court, and to warrant the issuance of an injunction to restrain the respondent, the tax collector of Santa Clara County, because the complaint fails to show that appellant would, by collection of the tax, be irreparably injured, or that it would be subjected to a multiplicity of suits thereby, or that the collection of the tax would necessarily cast a cloud upon the property involved. These are grounds calling for equitable interference upon general principles, and we submit that upon either of these general heads of equity jurisdiction the complaint is insufficient. The whole of the allegations of the complaint are directed to the proposition alone that the tax is illegal and void, and no especial circumstances are shown of irreparable injury, or that a multiplicity of suits would follow the collection of the tax. (*Dows v. City of Chicago*, 11 Wallace, U. S. S. C., 108, and authorities cited; *Savings and Loan Society v. Austin*, 46 Cal. 415.)

But the complaint was filed February 4th, 1873, after the Code took effect, and it is therefore unnecessary to discuss the question as to whether the taxes in question were or were not legally assessed. Section 3423, Civil Code, subdivisions four and nine, stating when injunctions will not be issued or allowed by a Court of equity, are as follows:

“To prevent the execution of a public statute by officers
“of the law for the public benefit.

“Where relief equally efficacious can be obtained by any
“other usual mode of proceeding except in case of breach
“of trust.”

In either of these cases an injunction will not issue. The

Points decided.

complaint itself shows that respondent is the Tax Collector of Santa Clara County; that he is the proper law officer executing a "public statute," to wit: the general revenue laws of the State of California, for the public benefit. If, as is sought in this case, an injunction will be sustained by merely averring that a tax is illegal, because description of property is imperfect, etc., the machinery of government may be stopped and its wheels locked, the treasury depleted at the caprice or whims of an individual whose duty it is as an integral part of that government and machinery, to bear his part of its burdens and obligations. * * * Evidently to prevent such a state of affairs, section 3423 of the Civil Code was enacted.

If the tax as assessed is illegal and void, as insisted by appellant, he had an ample remedy at law — could have paid the tax under protest, and recovered it back by a suit at law against respondent. This, we believe, is the "relief equally efficacious," referred to in ninth paragraph of section 3423 of Civil Code.

By the Court, RHODES, J.:

It was held in *Savings and Loan Society v. Austin*, 46 Cal. 415, and the other tax cases decided at the October term, 1873, and in *Houghton v. Austin*, 47 Cal. 646, that an injunction was not the proper remedy in those actions. Upon the authority of those cases, the order dissolving the injunction is affirmed.

Remittitur forthwith.

[No. 3,579.]

THE SPENCER CREEK WATER COMPANY v. M. L. VALLEJO.

SPECIAL CASES.—Proceedings for the condemnation of water to supply cities with pure water, and the right of way to conduct it, are "special cases" within the meaning of Section eight of Art. VI of the Constitution.

IDEM.—The Constitution gives jurisdiction of "special cases" to the County Courts, unless the statute confers jurisdiction upon some other Court.

Argument for Appellants.

JURISDICTION OF SPECIAL CASES.—The Legislature may confer jurisdiction of "special cases" upon the District Courts and the County Courts, but whether it may confer jurisdiction in such cases upon any other Court provided for by the Constitution, not decided.

IDEM.—The Legislature cannot confer jurisdiction of "special cases" upon the County Judge, nor can it confer such jurisdiction upon any tribunal or officer, except one of the Courts mentioned in the sixth Article of the Constitution.

COUNTY JUDGES.—The County Judge is not the County Court, and although the Legislature may authorize the Judges of Courts, at Chambers, to perform certain duties in respect to a cause, yet some Court must have jurisdiction of the cause.

APPEAL from a final order and judgment of the County Judge of Napa County.

The plaintiff was a corporation, organized for the purpose of supplying Napa City and the inhabitants thereof, and the inhabitants of other towns and places in Napa County, with pure fresh water; and, on the 27th day of October, 1871, filed a petition with the County Judge of Napa County, praying for the condemnation of the waters of Tulucay, or Spencer Creek, and the right of way over the lands of the defendants for conducting the water. Such proceedings were had that commissioners were appointed by the County Judge to assess damages; the damages were assessed by them, and they filed their report, which was confirmed by the County Judge, and he, on the 11th day of March, 1872, made a final order of condemnation. The defendants appealed.

The other facts are stated in the opinion.

W. S. Wells and *S. G. Hilborn*, for appellants, argued that the statute of 1858 was unconstitutional in so far as it attempted to confer jurisdiction of the proceedings under the statute upon the County Judge, (citing Stats. 1858, p. 218; Hittell Genl. L., 966, 968; Constitution of California, Art. VI., Secs. 1 and 8; *San Francisco and Alameda Water Co. v. Alameda Water Co.*, 36 Cal. 639; *Gilmer v. Lime Point*, 18 Cal. 260.)

W. W. Pendegast and *R. Burnell*, for Respondent.

Opinion of the Court — Rhodes, J.

By the Court, RHODES, J.:

This proceeding was instituted under the Act of April 22d, 1858 (the Act for the incorporation of water companies), for the purpose of acquiring the right to appropriate the waters of Spencer Creek, and the right of way for the conveyance of the waters, etc. It was commenced before the County Judge of Napa County, and was heard before and determined by him. It is urged by the defendants that the County Judge had no jurisdiction in the matter — that the Act of 1858, in so far as it attempts to confer authority upon the County Judges to hear and determine such applications, is unconstitutional.

That statute provides that “the mode of proceeding to appropriate and take possession of such land and waters, when the parties cannot agree upon a purchase thereof, shall be the same as prescribed in sections twenty-seven, twenty-eight and twenty-nine of an Act for the incorporation of railroad companies, passed April 22d, 1853, except that such proceedings shall be had before the County Judge of the county in which such lands, or waters, or both, are situated.” Section eight, Article VI. of the Constitution, confers upon the County Courts original jurisdiction “of all such special cases and proceedings as are not otherwise provided for.” The proceedings provided for in the statute of 1858 are to be classed as special cases. Jurisdiction of such special cases pertains to the County Courts, unless the statute confers it upon some other proper tribunal. The County Courts are the residuary donees of such jurisdiction. The Legislature may grant jurisdiction to those Courts, as well as to the District Courts; and in view of the decision in the appeal of Houghton (42 Cal. 35), in which it was held that the Court had no appellate jurisdiction of the proceedings sought to be reviewed, because the statute had declared that the judgment of the County Court should be final — in other words, because no appeal had been provided — it would seem to be the necessary conclusion that jurisdiction of special cases can be exercised only by those Courts to which it is granted by the statute and the County Courts, when not otherwise provided for.

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The question therefore arises whether, under the Constitution, the Legislature has competent power to create a tribunal and confer upon it jurisdiction in special cases; for it is beyond question that the County Judge is not the County Court, and although the Legislature may authorize the Judges of the several Courts to perform certain duties, at Chambers, in respect to proceedings in a cause, yet some Court has jurisdiction of the cause, and the Judge, in Chambers, whether of the same or another Court, acts as a commissioner, or in some other capacity, merely in aid of and subordinate to the Court having jurisdiction of the cause. It being, we think, beyond dispute, that a County Judge is not the County Court, if jurisdiction of special cases could be conferred upon the County Judge, it is equally competent to the Legislature to confer it upon the County Clerk, Recorder or Sheriff, or to create a new tribunal for the exercise of such jurisdiction.

It will be conceded that no appeal can be taken in special cases except to this Court; that a statute could not be upheld which granted appellate power in such cases to any other Court or tribunal; but there is nothing in the Constitution which indicates with a greater degree of certainty the design to confine the appellate jurisdiction of special cases to the Supreme Court, than there is to limit the original jurisdiction to the other Courts mentioned in the Constitution. The words of the clause of the Constitution already cited, conferring upon the County Courts jurisdiction "of all such special cases and proceedings as are not otherwise provided for," import that the Legislature may provide for the exercise of such jurisdiction by one or more of the courts mentioned in the sixth article of the Constitution. The District Courts and the County Courts may, by statute, be vested with such jurisdiction; but whether any other Court may be authorized by statute to exercise original jurisdiction in such cases, it is unnecessary now to determine; and it is our opinion that the Legislature is not authorized to provide for the exercise of such jurisdiction by any tribunal other than one of the Courts provided for by the Constitution, and that a statute which grants such

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jurisdiction to a judicial officer, cannot be upheld. The opposite view is repugnant to the first section of Article VI.; for that section declares that the judicial power of this State shall be vested in certain Courts therein enumerated, and such Recorders' and other inferior Courts as the Legislature may establish in any incorporated city or town. The power to hear and determine a special case is judicial power, and its nature or character is not in any respect changed by the fact that the Constitution did not assign it to some specified Court, as it did the jurisdiction of most of the cases at law and in equity.

Judgment reversed and cause remanded, with directions to dismiss the proceedings.

[No. 2,780.]

DUANE BALLARD AND ISAAC R. HALL v. JESSE D. CARR.

CONTRACT AGAINST GOOD MORALS.—A contract entered into between a client and an attorney, in which the attorney undertakes to resist a motion for a new trial in a case in the District Court of the United States in which a Mexican grant of land has been confirmed to the client, and to procure an order making the decree of confirmation final, or to procure a dismissal of the appeal, should one be taken, and to receive for his services a portion of the land, is not *contra bonos mores*, if no concealment or improper practices were to be used, or were in fact used by the attorney, in performing the contract on his part.

SPECIFIC PERFORMANCE OF CONTRACT.—A Court of equity will not, for the want of mutuality, refuse to enforce the specific performance of a contract between an attorney and client, by which the attorney undertakes to give his professional services in resisting a motion for a new trial made in the District Court of the United States, in a case where a Mexican grant of land has been confirmed to the client, and to procure the dismissal of an appeal if one is taken, and the client agrees to convey to the attorney a portion of the land, if he succeeds in his undertaking.

WAIVER OF FULL PERFORMANCE OF CONTRACT.—If a contract is entered into between an attorney and client, by which the attorney agrees to give his professional services in the matter of a confirmation of a Mexican grant of land in the United States courts; and, if the confirmation becomes final, the client agrees to convey to the attorney a portion of the land, and the attorney, after performing some service, is absent when

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the case is called in Court, and the client employs another attorney to assist in the matter, the client waives a full performance of the contract on the part of his attorney, if he still continues to recognize him as his attorney, and avails himself of his service.

HE WHO ASKS EQUITY MUST DO EQUITY.—If a party appeals to a Court of Equity for the specific performance of a contract, he must himself do equity, and submit to such terms as a Court of Equity will impose.

EQUITY BETWEEN ATTORNEY AND CLIENT.—If an attorney asks the specific performance of a contract to convey to him land for his professional services, and the client has employed other counsel to assist in the absence of the attorney, equity will allow the client compensation for the services of the counsel, and the amount of the compensation is the value of the services rendered.

APPEAL from the District Court, Fifteenth Judicial District, City and County of San Francisco.

On the 5th day of February, 1858, the District Court of the United States for the Southern District of California, entered a decree confirming to Thomas O. Larkin a tract of land in Monterey County, known as the Rancho Cienga del Gabilan, containing eleven square leagues. The grant was alleged to have been made to José Antonio Charvis, in Monterey, on the 26th day of October, 1843, by Manuel Micheltoreno, then Governor of California, and Charvis had sold to Larkin. The grant had been presented to the Commissioners for settling private land claims in California, and by them rejected, and the decree of the District Court was made on a review of their decision. On the 10th day of February, 1858, the District Attorney of the United States made a motion for a re-hearing or new trial, in the District Court, which motion was based on an affidavit that the grant was fraudulent — one of the so-called “Limantour frauds” — and that the seal attached to it showed this to be the case. Isaac Hartman was counsel for Larkin in the matter of the confirmation. This motion of the District Attorney was pending until March, 1860, when the defendant Carr purchased the land from the executors of Larkin, who, in the meantime, had died. Carr entered into the following contract with Hartman, on the day it bears date:

“This agreement, made and entered into this twentieth day of September, A. D. 1861, between Jesse D. Carr, of

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the first part, and Isaac Hartman, of the second part, both of the city of San Francisco, State of California, witnesseth as follows:

“That the said party of the first part hereby retains and employs the said party of the second part, as his attorney, to procure an order or decree of the District Court of the United States for the Southern District of California, making the decree final in said Court, which has already been entered up in case No. 314 therein, to wit: the case known as Thomas O. Larkin against the United States, for the place known as the Cienga del Gabilan, or to procure the dismissal of any appeal to the Supreme Court of the United States, that may be taken therein by the said United States.

“And the said party of the second part hereby agrees and undertakes on his part to do and perform the services above mentioned and set forth.

“In consideration of which the party of the first part agrees and undertakes, that so soon as the above services are performed by the party of the second part, he will then convey to said party of the second part two undivided leagues of the tract of land above mentioned and described, which said conveyance is to be made by instrument in writing in due form of law.

“And which conveyance of said two leagues of land, the said party of the second part agrees to receive and accept as full compensation of the services aforesaid.

“In witness whereof the parties have hereunto set their hands and seals, the date above written.

J. D. CARR, [L. S.]

ISAAC HARTMAN. [L. S.]”

Hartman advised his clients that the best policy was to delay the motion for a rehearing in the District Court until five years should elapse from the date of the decree of confirmation, so that the time for a writ of error to the Supreme Court of the United States would expire, and he seems to have acted upon this advice. The motion for a rehearing was finally called for argument, and submitted about the 1st of November, 1863, and Hartman argued it

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for Carr, and filed a brief. Hartman soon after left for Washington, where he had business in relation to land cases, and was away until the next summer. On the 15th day of March, 1864, the Court, of its own motion, made an order for a re-argument in the case, to be had on the 6th day of June, 1864. April 30, 1864, Carr wrote to Hartman at Washington, that a re-argument of the case had been ordered, and that he had got Mr. Patterson to go down and argue it, and he desired Hartman to procure certified copies of certain decisions in the Supreme Court of the United States, for the use of the Court. W. H. Patterson was an attorney and counsellor at law in the city of San Francisco. In June he appeared in the case at Monterey, and argued it for Carr, who, in the meantime, had been substituted on the record in place of Larkin, as the plaintiff. The District Attorney of the United States, on this argument, insisted that the grant was a forgery, and tried to demonstrate that it had on it the Limantour seal. Mr. Patterson in his reply and brief, argued that, assuming the grant to be a forgery (and he did assume it,) the United States had, before the decree of confirmation in 1858, in its possession, in its archives, conclusive proof that it was a forgery, and, having neglected to produce it on the trial, had been guilty of laches and a rehearing would not now be granted. Hartman did not return to California until August, 1864. The motion for a rehearing was denied on the 14th of August, 1865, and the confirmation became final, the time for an appeal having passed. Carr continued to consult Hartman with regard to the case, and before the motion was decided, got him to endeavor to obtain from the Attorney-General of the United States at Washington, an order to the United States District Attorney in California, to have the motion dismissed.

The plaintiff's testimony tended to show that Carr knew that Hartman was going to Washington in the fall of 1863, to remain during the winter, and made no objection. It did not appear that Hartman, in carrying out the contract on his part, concealed anything from the Court or Government, or used any improper practices. The grant was sur-

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veyed, and the final survey approved by the Surveyor-General, in April, 1866. In the fall of 1865, Hartman applied to Carr for a deed of two leagues, undivided in the grant. Carr replied that he did not understand that his services ceased, or that he was to have a deed until he (Carr) obtained a patent. The plaintiffs were the assignees of Hartman, and commenced this action for a specific performance of the contract. Among other defenses, Carr averred, in his answer, that the grant was a forgery, and that Hartman knew it was a forgery when the contract was made, and entered into it with intent to conceal the forgery from the Government of the United States and its officials, and to procure from the United States the eleven leagues of land under the pretense that the grant was genuine, and that the contract was against public policy. The only witnesses on the trial were Hartman for the plaintiffs, and Patterson and Carr for the defendant. Carr paid Patterson five thousand dollars for his services in the case. The Court below rendered judgment for the defendant, and the plaintiffs moved for a new trial. In denying a new trial the Court delivered the following opinion:

“This action was brought to compel the specific performance of a contract—the conveyance of certain real estate. The case was tried by the Court without a jury, and judgment given for the defendant on the grounds—1st. Want of mutuality. 2d. That the plaintiff’s assignor did not comply with the terms of the contract relied upon; and 3d. That the contract was against public policy, and therefore void. Since the decision of this case, our Supreme Court, in *Hall v. Center*, 40 Cal. 63, have held that the terms of a contract of the character counted upon in this action, can be specifically enforced. To that extent this Court erred. On a review of the evidence, this Court is still of the opinion that the plaintiff’s assignor did not perform the contract on his part, and was not excused or prevented from so doing by the defendant, and that the same is *contra bonos mores*.

Plaintiff’s motion for a new trial denied.”

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The defendant appealed from the judgment and order denying a new trial.

H. F. Crane and *S. M. Wilson*, for the Appellants, argued that Carr should not have employed another attorney without consulting Hartman, as there was plenty of time between the day the re-argument was ordered and the day the argument was fixed for, and cited. *In re Paschal*, 10 Wallace, U. S. 496; *Wylie v. Cox*, 15 How. U. S. 416; and *Sloo et al. v. Law*, 4 Blachford, 268. They also argued that the employment of Patterson was voluntary on Carr's part, and that Carr showed by his subsequent conduct that he waived Hartman's laches or default, if there was any, and cited *Fry on Spec. Perf.* sec. 657; *Noble v. James*, 2 Grant's Cases, Pa. 283; *Williams v. Bank of U. S.* 2 Pet. 101; *Risinger v. Cheeney*, 2 Gilman, 90; and *Huntington v. McGovern*, 29 Pa. 81. They further argued that the Court would not indemnify Carr for his expense in employing Patterson, and cited *Oaldfield v. Round*, 5 Ves. 508, *Calcraft v. Roebuck*, 1 Ves. 221; *Winnie v. Reynolds*, 6 Paige, 407, and 3 Parsons on Cont. 412.

W. H. Patterson, for Respondent, argued, that, as Hartman did not perform the contract, the plaintiff had no equity, and cited 2 Story's Eq. Jur. sec. 742; *Slocum v. Clossen*, 1 How. Ct. of Appeal cases, 705; and *Tibbs v. Morris*, 44 Barb. 144. He further argued, that, whether complete performance of a contract for professional services entitled the party to a specific performance was not to be considered, for, until complete performance, the contract was not mutual; and as there had not been complete performance in this case, the contract could not be enforced for want of mutuality, and cited *Tyson v. Watts*, 1 Md. Ch. 13; *Hamblin v. Dinneford*, 2 Edward's Ch. 531, and *Phillips v. Burger*, 8 Barb. 527.

By the Court, RHODES, J.:

There is not sufficient evidence in the case to support the defense, that the contract entered into between Hartman and the defendant was *contra bonos mores*. The title to the

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rancho had already been confirmed, and Hartman undertook to resist a motion in the nature of a motion for a new trial, and to procure an order making the decree of confirmation final, or to procure a dismissal of the appeal, should an appeal be taken to the Supreme Court of the United States. In performing such services, it is not shown that any concealment or improper practices were to be, or were in fact, employed by Hartman.

The objection that the contract cannot be enforced, because of the want of mutuality, cannot be sustained. (*Hall v. Center*, 40 Cal. 63.)

The evidence shows that after the defendant had employed Patterson to re-argue the motion before the District Court, he continued to recognize Hartman as his attorney, and availed himself of his service.. This must be regarded as a waiver of a full performance of the contract on the part of Hartman. The plaintiff having appealed to a Court of Equity to enforce the performance of the contract on the part of the defendant, must himself do equity, and must submit to such terms as a Court of Equity would impose. Compensation must be allowed to the defendant, for the services of Patterson, and it must be made an equitable lien in favor of the defendant, upon the land to which the plaintiff is entitled under the contract. The amount of the compensation is the value of the services rendered by Patterson. The defendant will be permitted to amend his answer, if he so elects, on the return of the cause.

Judgment and order reversed, and cause remanded for a new trial. Remittitur forthwith.

Mr. Chief Justice WALLACE, being disqualified, did not sit in this case.

[No. 10,073.]**THE PEOPLE v. WOODY.**

ASSAULT WITH INTENT TO COMMIT ROBBERY.—When it appears on the trial that a defendant charged with an assault with intent to commit

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robbery, presented to a traveler on the highway a cocked pistol, and said, "stop, or I will shoot you," It is the province of the jury to determine from the acts of the defendant, and from all the surrounding circumstances, whether the defendant intended to commit robbery or was actuated by some other purpose.

ERROR AFTERWARDS CURED.—Error of the Court in refusing, in a criminal case, to allow the defendant to ask a witness a question, is cured by afterwards permitting the witness to answer the same question.

APPEAL from the County Court of Santa Cruz County.

The facts are stated in the opinion.

H. Heath, for Appellant.

Attorney-General Love, for Respondent.

By the Court, CROCKETT, J.:

The defendant was convicted of an assault with intent to commit robbery; and has appealed from the judgment and from an order denying his motion for a new trial. The point chiefly relied upon on the appeal is, that the evidence did not justify the verdict.

The facts disclosed by the evidence are, that two men on horseback, about eleven o'clock at night, on the highway near the town of Santa Cruz, were stopped by the defendant, who advanced from the side of the road so as to intercept them, and when about ten feet distant, presented a cocked and loaded revolver, saying, "stop, stop, or I'll shoot you." The men halted, and one of them drawing a revolver, and the other lowering a rifle, they ordered the defendant to drop his pistol and hold up his hands, which he did; but immediately started to run away. The man with the rifle called to him to stop, or he would shoot him. He then stopped, and being arrested, was taken into town, where they released him from custody; but, on consulting another person, decided again to arrest him, which they did in about half an hour after his release, the defendant in the meantime having made no effort to escape. It further appeared that about eight o'clock that evening the defendant borrowed the revolver in a saloon in Santa Cruz, in the presence of several persons, without any attempt at con-

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cealment, saying that he had information which induced him to believe or suspect that certain members of the Vasquez band of robbers were concealed in a house near the place where the assault afterwards occurred, and that he was going to watch for them, and might need a pistol while thus engaged.

The defendant, while testifying on his own behalf, admitted that the assault occurred in the manner above stated; but said that before stopping the men, he saw that one of them was armed with a rifle; and the theory of the defense is that his object in stopping them, was to ascertain whether they were Mexicans or suspicious characters, who probably belonged to the Vasquez band.

It was peculiarly the province of the jury to determine from the acts of the defendant and all the surrounding circumstances, what his purpose was in stopping persons on the public highway, at eleven o'clock at night, with a cocked and loaded revolver, presented at short range.

This is the usual method in which highway robberies are committed; and an assault under such circumstances not only affords *prima facie* evidence of an intent to rob, but if unexplained, would be sufficient to warrant a conviction for an attempted robbery. The jury heard the defendant's explanation, and it was for them to decide upon its credibility. Possibly they may have believed from all the circumstances and from the manner of the defendant on the stand, that the previous avowal of his intention to hunt for members of the Vasquez band, was only a pretense to divert suspicion, and disguise his real motive. The theory that he stopped the men for the mere purpose of ascertaining whether they were probably members of the Vasquez gang, is not plausible. A sane man armed only with a revolver, at eleven o'clock at night, would not have been apt to stop upon the public highway two of those noted bandits, whom he knew to be well armed. It was for the jury to weigh all these circumstances in deciding upon the motives of the defendant, and we cannot say that there was not sufficient evidence to support the conclusion at which they arrived.

The only remaining point is that the Court erred in re-

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fusing to permit the defendant to answer a question propounded by his counsel, as to what his motive was in stopping the men on the road. A complete answer to this point is, that the question was afterwards substantially repeated, and permitted to be fully answered. He gave his own version of the whole transaction, and said, "I stopped them for the purpose of seeing who they were." There is no error in the record.

Judgment affirmed. Remittitur forthwith.

Mr. Justice RHODES did not express an opinion.

[No. 3,719.]

IN THE MATTER OF THE GUARDIANSHIP OF THE ESTATE OF
CHRISTOPHER MEDBURY, A LUNATIC.

PARTY TO AN APPEAL FROM ORDER OF PROBATE COURT.—On an appeal from an order of the Probate Court removing a guardian of an estate, and appointing another guardian in his place, taken by the guardian removed, the newly appointed guardian is a necessary party.

TRANSCRIPT ON APPEAL.—A transcript on appeal must be agreed to by all the parties or their counsel, or certified to by the clerk. A stipulation agreeing to the transcript, signed by the counsel of all the parties except one, is not sufficient.

APPEAL from the Probate Court, Marin County.

The facts are stated in the opinion.

Gray & Brandon, and *W. H. Patterson*, for the Appellant.

W. H. Fifield, for Respondent, Porter.

T. B. Bishop and *McAllisters & Bergin*, for the other Respondents.

By the Court, CROCKETT, J.:

This appeal is by Brangon, from an order of the Probate Court, removing him from the guardianship of the estate of

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Christopher Medbury, an insane person, and appointing one Porter as guardian. The order directs Porter to immediately take possession of the estate, and that Brangon, without delay, deliver all the property to him. The proceedings for the removal of Brangon were instituted by a brother of the lunatic, who filed a petition setting forth that Brangon had failed to give a new bond with sureties, as required by a former order of the Court, and that the estate was being wasted for want of a proper person to take charge of it, and praying for his removal, and that some suitable person be appointed in his place. The transcript on appeal is not certified by the Clerk; but there is annexed to it a stipulation signed by the counsel for Brangon, and for the brother and wife of the lunatic, to the effect that the transcript contains "true copies of the notice of appeal herein, of the admission of service thereon, of the order appealed from, and of all papers and orders on file or of record in the office of the Clerk of said Probate Court, relating to or affecting the order removing said Brangon and appointing said Porter, and of the indorsements thereon;" that an undertaking on appeal, in the sum of three hundred dollars was duly filed, "it being understood that this stipulation is to have the same effect as and no other than" the certificate of the Clerk would have. The stipulation is not signed by Porter, or any one on his behalf; and he moves through his counsel to dismiss the appeal on the ground that he is a necessary party to it, and that the appellant is not entitled to be heard on a transcript, neither certified by the Clerk nor agreed to by the said respondent or his counsel. The objection to the transcript was taken in the proper method, and the appellant had the opportunity to procure it to be properly authenticated. If the order removing Brangon be reversed, Porter would of course be displaced as guardian, and he is a necessary party to the appeal. His rights cannot be determined on a transcript not certified by the Clerk, nor agreed to by his counsel. It is said, however, that Porter had not appeared in the proceeding, and was not represented by counsel, and that the appellant did all he could, when he served him with a copy of the notice of appeal and of the

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transcript. But this does not excuse his omission to procure the certificate of the clerk, and particularly after being notified that the transcript was objected to on this ground.

Appeal dismissed.

Mr. Justice RHODES did not express an opinion.

[No. 10,072.]

THE PEOPLE v. WINCHESTER DOYELL.

TERMS OF COUNTY COURT.—The Code of Civil Procedure only purports to deal with the times when the terms of the County Court should be commenced after it went into operation, on the first day of January, 1873.

EFFECT OF CODE OF CIVIL PROCEDURE ON TERMS OF COURTS.—The fact that the Code of Civil Procedure, approved March 11th, 1872, fixed the time when the terms of a County Court should commence, and repealed a prior statute also fixing the times of their commencement, did not suspend the business of the Court prior to the first day of January, 1873, nor affect the general law which required a term to be continued until the business of the Court was disposed of; nor did it, when it went into effect, put an end to a term in progress, commenced on the second Monday in December, 1872.

IDEM.—The effect of the repealing clause on the prior statute fixing the terms was, to declare that the terms should not thereafter begin on the days mentioned by virtue of any authority derived from the statute repealed.

INDICTMENT — WHEN MAY BE FOUND.—A Grand Jury in Sierra County, convened at a term of the County Court, commencing on the second Monday in December, 1872, had jurisdiction to find an indictment after the Code of Civil Procedure went into effect, January 1, 1873.

JUROR MAY BE WITNESS.—A juror is not disqualified from becoming a witness in a proper case, but public policy prohibits him from impeaching his own verdict by an affidavit, that a juror made statements in the jury room, of matters not in evidence.

IMPEACHMENT OF WITNESS.—When an attempt is made to impeach a witness by proving former statements made by him in conflict with what he has stated before the Court, his credit cannot be sustained by proof that he made to other persons, before being called as a witness, the same statement detailed in his testimony.

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IDEM.—Such statements made by the witness may, however, be admissible in contradiction of evidence tending to show that the statement made by him under oath is a fabrication of a late date, if the statements were made before their effect could be foreseen; and, perhaps, in other peculiar cases.

STATEMENT OF TESTIMONY, IN CHARGE OF JUDGE.—If the Judge, in his charge to the jury in a criminal case, undertakes to state a portion of the testimony, the safer way is to recite the language of the witness as taken down by the Reporter, or in the Judge's notes; but when the language of the District Judge is in substance and effect a repetition of the testimony, the defendant cannot complain.

INSTRUCTIONS TO A JURY.—All the charge of a Court to the jury must be taken together, and if it harmonizes as a whole, and correctly presents the law, a new trial will not be granted because a separate instruction does not contain all the conditions which are to be gathered from the entire text.

MURDER IN THE SECOND DEGREE.—A homicide which is unlawful, and accompanied with malice, but not deliberate and premeditated, is murder in the second degree.

APPEAL from the District Court, Tenth Judicial District, County of Sierra.

The defendant was indicted for the crime of murder, in the killing of Alexander Black, on the 2d day of November, 1872. The indictment was found by the Grand Jury on the 19th day of March, 1873. The term of the County Court at which it was found, commenced on the second Monday in December, 1872.

The Code of Civil Procedure was approved on the 11th day of March, 1872, and went into effect on the 1st day of January, 1873. When the cause was called for trial, the counsel for the defendant moved to dismiss the indictment, on the ground that it was found at a time when no term or session of the County Court was authorized by law to be held. The Court overruled the motion. After a verdict of guilty of murder in the second degree, the defendant's counsel moved the Court to arrest the judgment for the same reason. The Court denied the motion. The defendant moved for a new trial, and in support thereof, filed the affidavit of Frank Johnson, one of the jurors, stating, that while the jury were deliberating, defendant's character was

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being discussed, and that H. R. Perry, one of the jurors, stated that defendant was, to his knowledge, a quarrelsome man, and that he was at one time on a drunk at Downieville, and had his arms taken away from him. The affidavit also stated that W. E. Corbett, another of the jurors, left the jury-room through a window, and remained absent eight or ten minutes unattended by the sheriff, and that the jury had with them the Penal Code, and read portions thereof relating to murder in the first and second degrees, and to manslaughter. The prosecution filed affidavits of Thomas Steel, a juror, and said Corbett, contradicting Johnson as to Corbett having left the jury-room.

The homicide was committed in Sierra County, about twelve miles from Downieville. Defendant claimed a tract of land under the Possessory Act of 1852. Black, several days before he was killed, employed one Andrews to cut some firewood for him on the land claimed by the defendant. After the wood had been cut, the defendant claimed it as his property, and loaded it on a wagon, and was hauling it away, when he was met by the deceased, and one Andrews, who stepped before the team and stopped it. The deceased ordered the defendant to unload the wood, and at the same time asserted his ownership of it. A controversy about the wood followed — the parties retaining their respective positions — but no violent language was used until a son of the defendant, about eight years of age, standing near, said that the wood belonged to his father. The defendant told the boy to dry up, but he repeated his assertion, when the deceased told him he did not want to talk to boys. Thereupon the defendant sprang at the deceased, who was standing still, and struck him with his axe, saying at the same time, "d——n you, you shall not insult or abuse my boy." The first blow was caught by the deceased, but the defendant disengaged the axe, and then struck a fatal blow.

On the trial, one Burrows, who was present at the killing, testified on behalf of the defendant that he saw the deceased, a few minutes before the attack, put his hand to his pocket, and partly or wholly draw a pistol, and then replace it. On cross-examination the witness was asked if,

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on the day of the killing, he had not stated to Byington and Cochran that he did not see any weapon in the hands of the deceased at the time of the difficulty? He answered that he had no recollection of having made such a statement. The counsel for the defendant, to support the credibility of Burrows, then offered to prove that Burrows had, on the day of the killing, told other persons than Byington and Cochran, that he saw the pistol. The testimony was excluded by the Court. Byington was called by the prosecution, and testified that Burrows told him, on the day Black was killed, that he saw no weapon on the deceased. The defendant was convicted of murder in the second degree, and appealed from the judgment, and from an order denying a new trial.

P. Vanclief and *G. G. Clough*, for the Appellant, argued that the Court erred in fixing the order of argument without any reason therefor, and cited the Penal Code, sections one thousand and ninety-three and one thousand and ninety-four; and that it was error to allow a juror to give evidence of the bad character of the defendant in the jury-room, and cited Penal Code, sections one thousand one hundred and twenty and one thousand one hundred and eighty-one; and also that it was error for the jury to read and construe the law in the jury-room, and cited Penal Code, section one hundred and thirty-seven; and *Hardy v. State*, 7 Mo. 607. They also argued that it had been decided in this State that a juror could not impeach his own verdict, only as a rule of common law, and that there was no room for its application under the Codes. They also argued that the declarations made by the juror Perry, in the jury-room, were made by him as a witness, because he was acting under oath, and cited Code of Civil Procedure, sections one thousand eight hundred and seventy-eight and one thousand eight hundred and seventy-nine, and that said sections were repugnant to the common law, excluding a juror from being a witness; and, therefore, his statements in the jury-room were evidence before the jury, and should not have been received. They argued

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further, that the Court erred in refusing to permit evidence of Burrows' former statements in support of the one made by him as a witness; and cited 2 Phillips' Ev. (4th Am. ed.) Cow. & Hill's Ev. 600, note; *Cook v. Curtis*, 6 Harris and John, (Md.) 93; 2 Wash. C. C. Rep. 148; *State v. Twitty*, 2 Hawks, 448; *Packer's Lessees v. Gonsalus*, 1 S. & R. 536; *Henderson v. Jones*, 10 Sergt. & R. 322; *Coffin v. Anderson*, 4 Blackf. 395; *Beauchamp v. State*, 6 Blackf. 299; *Wright v. Deklyne*, 1 Pet. C. Ct. 199; *State v. George*, 8 Ired. 324; *State v. Dove*, 10 Ired. 469; *March v. Harrell*, 1 Jones, 329; *State v. DeWolf*, 8 Conn. 93; *People v. Vane*, 8 Wend. 78; *People v. Moore*, 15 Wend. 419; *Clapp v. Wilson*, 5 Den. 286; *Robb v. Hankley*, 23 Wend. 50.

They also argued that the Court erred in instructing the jury that if the killing was unlawful, accompanied with malice, but not deliberate and premeditated, it was murder in the second degree; that murder in the second degree was not defined by our statute, except that it was the residuum of murder at common law, after subtracting therefrom what was defined to be murder in the first degree; but that murder at common law was never less than the killing of a human being with malice aforethought, or malice prepense; and, therefore, to constitute murder in the second degree, the killing must be with the malice prepense of the common law; and unless the word malice, as used in the instructions, might be understood to mean the same as the common law malice prepense, the instructions were erroneous; but they could be so understood, if malice prepense implied either deliberation or premeditation.

John L. Love, Attorney-General, for the Respondent, in relation to the order of argument by counsel, cited *People v. Fair*, 43 Cal. 137, and argued that Burrows' statements made before he was a witness, in support of his testimony, could not be received for the purpose of sustaining his character as a witness.

By the Court, McKINSTRY, J.:

1. On the 19th day of March, 1873, the defendant was indicted for the murder of Alexander Black.

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The Grand Jury by whom the indictment was presented, was impaneled at the term of the County Court of Sierra County, which began on the second Monday of December, 1872. By the law then in operation (Stats. 1864, p. 41), there were held in the County of Sierra four terms of the County Court in each year, commencing on the third Monday of April, June and September, and second Monday of December. The Code of Civil Procedure, which went into operation on the 1st day of January, 1873, provided that the terms of the County Court of Sierra must be held on the same days as were named in the statute of 1864, and repealed that statute. But this Code did not suspend all the business of the Court, nor put an end to the terms then in progress. The Code of Civil Procedure (Section 88), only purports to deal with the times when the terms should be commenced, after the Code went into operation. The effect of the repealing clause on the prior statute, fixing the terms, was to declare that the terms should not thereafter begin on the days mentioned, by virtue of any authority derived from the statute repealed. But the general law which requires a term to be continued until all the business of a Court is disposed of, was not affected by the repeal.

The Grand Jury, therefore, had jurisdiction to find and present this indictment.

2. A juror is not disqualified to become a witness in a proper case. But public policy prohibits a juryman from impeaching his own verdict by affidavit.

3. There are cases which sustain the proposition of defendant's counsel, that when an attempt is made to impeach a witness by proving former contradictory statements, he may be supported by evidence that he has made to other persons, declarations consistent with his testimony. Such is the law of Indiana, and perhaps of Pennsylvania and North Carolina. In New York, as in England, after much uncertainty, the rule seems now to be settled that such evidence is ordinarily inadmissible; and in others of the States it is rejected. The best elementary writers reach the conclusion that the evidence is to be received only in exceptional cases. The witness cannot be confirmed by

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proof that he has given the same account before, for his mere declaration is not evidence. His having given a different account, although not upon oath, necessarily impeaches either his veracity or his memory; but his having asserted the same thing does not in general carry his credibility further than, nor so far as, his oath.

Such declarations may, however, be admissible in contradiction of evidence tending to show that the account is a fabrication of late date, where it may be shown that the same account was given before its ultimate effect and operation (arising from a change of circumstances,) could have been foreseen; and also, perhaps, in other peculiar cases. (1 Wharton Am. Cr. L. 820; 2 Phillipp's Ev. C. and H. notes, 5 Am. Ed. Star. p. 915; Roscoe's Cr. Ev. 97; 1 Greenl. Ev. 469; Starkie's Ev. 253.) In the present case the record does not suggest that the witness occupied any peculiar relation to the defendant or the deceased, or to any matter arising on the trial or transpiring in the evidence, which should constitute a reason for a departure from the general rule.

The objections to the questions, of the character here referred to, were properly sustained.

4. In his charge, the District Judge stated a portion of the testimony of the defendant, not repeating his exact words, but giving their substance.

The safer way is to recite the language of the witness, as taken down by the reporter, or in the Judge's notes. But when—in the opinion of this Court—the statement of the District Judge is, in substance and effect, a repetition of the testimony, we are not authorized to grant a new trial for an inadvertence which could not have influenced the action of the jury improperly.

5. The defendant claimed to be the owner of the wood (the subject of the dispute which preceded the killing), because the same was cut by the deceased from land of which the defendant was in the constructive possession, under the Act of the Legislature known as the "Possessory Act."

As the wood was in the actual possession of the defendant at the time of the killing, he was, *prima facie*, the owner

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of it; and the evidence of the location of the land claimed by him, tended to show his actual ownership (as against the fact that it was cut by deceased,) and his good faith in defending his possession. The evidence as to the location of the eastern line of the defendant's claim, and as to the monuments designating it, was conflicting. The Court below informed the jury that the evidence as to the lines of defendant's claim was admitted for the purpose of showing his good faith, and that it was unnecessary for them to fix the location of the east line; or, in order to arrive at a verdict, to determine whether the defendant had complied with the conditions of the Act of the Legislature, so as to entitle him to be deemed in possession of the land. In effect, the charge was that if the defendant was in the actual possession of the wood, and believed, as a reasonable man, that he was the owner of it, he had the same right to protect his possession as if, in law and fact, he was the owner. Particular expressions may be subject to criticism, but the instruction given would seem to be as favorable to the defendant as he could demand.

6. Counsel for defendant requested the Court to charge: "If, under the instructions given you, you shall find that the wood in dispute between the defendant and the deceased, at the time of the killing, was the property of defendant, then the defendant was not required by law to deliver or give up the possession of said wood to Black, the deceased, in order to prevent such personal conflict as might be necessary to defend his possession; but on the contrary, the defendant had a right to defend his possession of said wood against any forcible attempt of Black to take it from him; and, if necessary for that purpose, had a right to kill Black; for the owner of personal property in his possession has a right to use such force as is necessary to prevent the forcible taking of it from his possession by one not entitled to the possession of it."

The Court gave the instruction as asked, with the addition following: "If, however, the alleged trespass is unaccompanied by any felonious attempt, the law does not admit the force of the provocation to be sufficient to warrant

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the owner to make use, in repelling the trespass, of a deadly weapon; and if, under such circumstances, the owner of the property, with a deadly weapon, slays the trespasser, the owner is guilty of murder."

The defendant excepts to that portion of the instruction added by the Court, on the ground that it declares that nothing short of an attempt to commit a felony can be admitted as a sufficient provocation to reduce the homicide below murder.

The instruction, as originally drawn, assumed the hypothesis that the defendant was acting in self-defense, with full possession of his faculties and control of his temper. It was addressed to the question of justification, and not to the great provocation and irresistible passion which enter into the definition of manslaughter. The proviso, added by the Court, treated of the same subject, and simply announced that, in a certain event, the defendant would still be guilty of murder, notwithstanding the general proposition contained in the instruction as prepared by counsel. In another part of the charge the Court explained the law of manslaughter, and the difference between that crime and murder. The instruction excepted to is to be read as if it contained a clause, "if the defendant was not carried away by irresistible passion," etc. Such is the meaning which was conveyed to the jury; such its fair and reasonable construction, because, thus construed, it accords with what is elsewhere said in the charge with respect to manslaughter.

We must take the charge together, and if without straining any portion of the language, it harmonizes as a whole, and fairly and correctly presents the law bearing on the issues tried, we will not disturb the judgment because a separate instruction does not contain all the conditions and limitations which are to be gathered from the entire text.

It is true that an error which might affect the defendant will be presumed to have injured him; but another presumption is, that jurors are men of common intelligence, and capable of comprehending the ordinary use of lan-

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guage, as applied to the particular proposition under consideration, and in reference to which it is employed. We will not assume that the jurymen may not have understood the charge as we understand it.

7. The Court charged the jury, among other things, "If you believe from the evidence that the killing was unlawful, accompanied with malice, but not deliberate and premeditated, your verdict will be murder in the second degree." This is assigned as error.

Murder is the unlawful killing of a human being with malice aforethought.

The malice aforethought may be expressly shown by the proof of facts affirmatively establishing the killing to have been the result of a formed intention to take life.

To establish the malice aforethought, however, the specific intent to kill need not be proved. To constitute a crime, there must be a joint operation of act and intention. But the common law measures an act which is *malum in se*, substantially by the result produced, though not contemplated, holding the doer of the act guilty of the thing done in the same manner as if it were specially intended, though not always guilty of the crime committed in the same degree. (*People v. Foren*, 25 Cal. 365.) Whenever one, in doing an act with the design of committing a felony, takes the life of another, even accidentally, this is murder. (Acts of 1850, p. 220, Sec. 25; 2 Bish. Cr. L. 741.) In such homicides the law superadds the intent to kill to the original felonious intent thus imputed. The thing done having proceeded from a corrupt mind, is to be viewed the same, whether the corruption is of one particular form or another. (Ruth. Inst., Ch. 18, Sec. 9; 1 Bish. Cr. L. 411.)

The amendment (of 1856) of the Act of 1850, "concerning crimes and punishments," did not change the law of murder, done in the attempt to commit a felony. It only prescribes a severer punishment where the murder is committed in the attempt to perpetrate arson, rape, robbery or burglary (on account of the enormity of these offenses), than

where it is committed in carrying out any other felonious design.

Murder of the first degree (aside from that committed in the perpetration or attempt to perpetrate the felonies enumerated) is any kind of unlawful, willful, deliberate and premeditated killing; all other kinds of murder are of the second degree. (Act "concerning crimes," etc., Sec. 21, as amended April 19, 1856.) Unless, therefore, there can be an unlawful killing, "with malice aforethought," which is not, within the meaning of the twenty-first section, willful, deliberate and premeditated, the statute has failed, fully and intelligibly, to separate the two degrees of the crime.

The malice aforethought, which is an ingredient of murder, is express or implied.

Express malice is that deliberate intention to take away the life of a fellow-creature which is manifested by external circumstances capable of proof. Murder of the first degree is where the circumstances prove, beyond a reasonable doubt, the intent to kill; it is a willful, deliberate and premeditated killing. (*People v. Bealoba*, 17 Cal. 389.) If the intent to take life is proven, there need be no appreciable space of time between the intention to kill and the act of killing. (*People v. Sanchez*, 24 Cal. 30.)

There is no room for the consideration of implied malice, if express malice—the deliberate intention to take life—is made manifest by the evidence.

But, beside those committed in the perpetration of felonies, a large number of homicides have been adjudged murder, where the specific intent to take life does not appear or does not exist. Thus, where the killing is involuntary, but happens in the commission of an unlawful act, which, in its consequences, naturally tends to destroy life, it is murder; so, if the intent to kill is not made apparent, but the killing is unlawful, and not done in the heat of passion, or the specific intent to take life not appearing, all the circumstances show an abandoned and malignant heart. In these, and in like cases, the malice aforethought is implied, the law attributing to the slayer the intent to kill, although such intent is not made manifest as a fact.

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On the other hand, the law, in some cases of voluntary manslaughter, disregards the actual intent to kill, when the killing is done in a sudden passion, caused by sufficient provocation.

In the former cases the slayer is presumed to be actuated by an intent which may not exist; in the latter (out of forbearance for the weakness of human nature) the slayer is presumed not to be actuated by an intent to kill, although such intent may in fact exist.

Thus the presence or absence of "malice aforethought" has come to be determined oftentimes by artificial or technical reasoning, and not always by a simple reference to the actual intent to kill, as made manifest by the circumstances proved in each case. And the crime is equally murder where the malice aforethought is expressly proved and where it is implied—as from the killing in the absence of considerable provocation, or from such wanton recklessness, on the part of the slayer, as shows an abandoned and malignant heart.

The amendment of 1856 did not change the law of murder. (*People v. Haun*, 44 Cal. 96.) But, besides its effect on homicides committed in the attempt to perpetrate certain felonies, it prescribes a more severe punishment for those murders in which the express intent to take life is affirmatively proved, than for those in which the express malice not being proved, the malice aforethought is implied.

If the unlawful killing is done without the provocation and sudden passion which reduces the offense to manslaughter, or is done in the commission of an unlawful act, the natural consequences of which are dangerous to life, or is committed in the attempt to perpetrate a felony other than those mentioned in the description of murder in the first degree, or the circumstances of the killing show an abandoned and malignant heart, this is murder in the second degree, unless the facts prove the existence in the mind of the slayer of the specific intent to take life. Malice aforethought is implied from the absence of considerable provocation, the wanton recklessness, or the felonious purpose; but the express malice—the deliberate intent to take life—

Points decided.

is not manifested by the facts. (*People v. Bealoba*, 17 Cal. 389; *People v. Sanchez*, 24 Cal. 17; *People v. Foren*, 25 Cal. 361; 1 East's P. C. 255; Wharton's Am. Cr. L. 420; 1 Browne's appendix, 22; 1 Ashm. 298-9.) The language employed in the *People v. Long* (39 Cal. 694), is to be taken in a sense which accords with what is said above. If it is there intimated that in murder of the second degree there may be an intention to take life, this is to be considered as referring to the intent which the law imputes by reason of the corrupt motive of the slayer, or otherwise, and not to an actual preconceived design to kill.

We do not think that the charge complained of was erroneous.

It is not to be understood from the distinction above made, based on the difference between express and implied malice, that a jury are to refuse to draw natural inferences from the facts in evidence. On the contrary, since the condition of a defendant's mind can only be ascertained by his conduct, it is the duty of the jury to weigh all the facts, including the acts of the defendant before and after the fatal assault, which are admitted in evidence, the character of the weapon used, and all other circumstances which throw light upon his purpose. If the evidence proves the very intent to take life, the murder is of the first degree. But the inquiry relates to a real, not a suppositive state of mind; to an actual intention, not to one merely attributed to a defendant by a rule of law.

Judgment and order denying the motion for new trial affirmed.

Mr. Justice RHODES did not express an opinion.

[No. 4,116.]

RUDOLPH COHEN v. J. E. GOUX.

DEFENSE TO ACTION ON NOTE.—The maker of a promissory note, as against the payee, may show a want of consideration for the making of the note, and the same, if shown, is a good defense to an action brought on it.

Opinion of the Court — Wallace, C. J.

APPEAL from the District Court, First Judicial District, County of Santa Barbara.

The defendant appealed.

The other facts are stated in the opinion.

Charles E. Huse, for the Appellant, cited *Parsons on Notes and Bills*, Vol. 1, p. 183.

J. F. Williams, for the Respondent, cited section 1856 of the Code of Civil Procedure.

By the Court, WALLACE, C. J.:

The action is brought upon an instrument in writing for the direct payment of money, designated in the pleadings a promissory note, and having in fact most of the elements of a contract of that character. It was made by the defendant and one Manuela Packard, and was payable on its face to the order of R. Cohen & Co., a copartnership firm, since dissolved, of which copartnership the plaintiff had been a member.

The answer of the defendant sets up that the latter signed the instrument at the request of one Kahn, at the time a member of the firm of R. Cohen & Co., without consideration, and only for the accommodation of the plaintiff, of all of which the plaintiff at the time had notice, etc.

At the trial the plaintiff put the note in evidence, and rested.

The Bill of Exceptions in the record proceeds as follows: "The defendant, Goux, was then offered as a witness on his own behalf, to prove by his testimony that said note was signed by him without any consideration, and as an accommodation to the plaintiff. The plaintiff objected to said evidence, on the ground that the note itself carried on its face a consideration, and was the best evidence. The objection was sustained by the Court and the defendant duly excepted. Thereupon the Court ordered the judgment for the plaintiff in the full amount claimed."

That the defendant was at liberty, as against the plaintiff

Points decided.

here, to show want of consideration for the making of the note, and that such want of consideration, if shown, amounted to a full defense to the action, are propositions too plain to admit of discussion. The Code of Civil Procedure, section one thousand eight hundred and fifty-six, cited by the counsel for the respondent, has wrought no change in the law in these respects.

Judgment reversed and cause remanded. Remittitur forthwith.

[No. 3,918.]

ROBERT A. THOMPSON, AS ASSIGNEE OF JOSEPH L. KING, BANKRUPT, v. HUGH H. TOLAND, ADMINISTRATOR WITH THE WILL ANNEXED OF THE ESTATE OF JOHN SIME, DECEASED; P. J. WHITE AND C. H. BRADFORD, AS TRUSTEES OF THE ESTATE OF JOHN SIME & Co.; BENJAMIN F. HASTINGS, AS SURVIVING PARTNER, AND BENJAMIN F. HASTINGS, INDIVIDUALLY, DOING BUSINESS UNDER THE NAME OF JOHN SIME & Co., BANKRUPTS; JOSEPH M. DOUGLAS, AND BENJAMIN F. HASTINGS.

SALE OF MINING STOCKS.—If the owner of mining stocks allows his broker, who purchases for him, to hold the certificates in such a manner that they will pass by delivery on the endorsement of the broker, with nothing on the face of the certificates to indicate that the real owner has any interest in the stock, a purchaser in good faith from the broker, without notice of the rights of the real owner, acquires a good title to the same, even if the broker, by a contract with his principal, had no right to sell or hypothecate the stocks without the consent of his principal.

ITEM.—In this State, mining stocks properly endorsed pass by delivery; and if the true owner places them in the hands of another, on some secret trust between them, without anything on the face of the certificates to show his ownership, he, and not an innocent purchaser or pledgee, must bear the loss.

WORD "TRUSTEE" IN CERTIFICATE OF STOCK.—The addition of the word "trustee," in a certificate of stock, to the name of the person to whom it is issued, does not show that such person has not the full right to deal with it as his own, nor give the person dealing with him notice that any other person has any interest in the same.

Statement of Facts.

ACQUIRING INTEREST OF PLEDGOR IN STOCK.—If the person who holds mining stock in secret trust for another, pledges the same for a debt of his own, and the United States District Court, upon the bankruptcy of the pledgor, holds the transaction a fraud on the Bankrupt Law, and compels the pledgee to account to the assignee of the pledgor for the value of the same, and renders judgment against the pledgee, and the pledgee pays the judgment, he thereby acquires the title of the assignee and pledgor, to the stock.

IDEM.—Though such pledge may be a fraud under the Bankrupt Law, as between pledgor and pledgee, it is nevertheless valid, as between the pledgee and *cestui que trust*.

CONVERSION OF STOCKS BY PLEDGEE.—If one who holds mining stocks in secret trust for another, pledges the same for his debt, without notice to the pledgee of the interest of the *cestui que trust*, and the pledgee sells the stock without previous demand and notice, the right of action for the conversion is in the pledgor, and not in the *cestui que trust*.

IDEM.—If, in such case, the *cestui que trust* has a cause of action outside of the contract of pledge, he must first pay or tender the money for which the stocks were pledged.

VERDICT AGAINST EVIDENCE.—A verdict will not be set aside as contrary to the evidence, where there were but two parties to the transaction, and one of them is dead, and the survivor, the only witness, is contradicted on other matters, and does not testify positively as to the existence of the fact on which the jury found.

REDEMPTION OF STOCKS PLEDGED.—The pledgee of mining stocks, upon a redemption of the pledge, is not obliged to return to the pledgor the identical certificates pledged, but may return certificates corresponding to those received.

IDEM.—The mere fact that the pledgee of mining stocks sells the particular certificates pledged, does not render him liable as for a conversion of the pledge, provided the pledgee, upon a redemption, restores similar certificates, and has been at all times ready to do so.

ACTION BY PLEDGEE FOR CONVERSION OF PLEDGE.—The pledgee, as against a stranger to the pledgor and wrong doer, who has converted the pledge, may recover its full value; for he is answerable over to the pledgor for any surplus in his hands; and if he recovers in such action, and the wrong doer satisfies the judgment, he thereby acquires a title to the pledge.

PROCEEDINGS IN BANKRUPTCY AS EVIDENCE.—In an action by the assignee in bankruptcy of a *cestui que trust* of the pledgor, brought against the pledgee, to recover the pledge or its value, where the trust was secret, and no offer was made to redeem the pledge, proceedings in the United States District Court on the bankruptcy of the *cestui que trust* are admissible in evidence on behalf of the defendant.

APPEAL from the District Court, Twelfth Judicial District, City and County of San Francisco.

The case was thus: Tilden & Breed were brokers in San

Statement of Facts.

Francisco, and engaged in buying mining stocks on commission for others, and when they loaned a portion of the money to make a purchase, were in the habit of keeping the stock purchased as their security. Joseph L. King employed them as his brokers, to buy mining stocks, and entered into a contract with them, which is contained in the following letter:

“SAN FRANCISCO, March 21, 1868.

Joseph L. King, Esq., Virginia:

Dear Sir—In conversation between yourself and our Mr. Tilden, a few days since, certain general arrangements were made as a basis upon which our business relations should be conducted. In order to prevent any possible misunderstanding of the same in the future, we deem it best to state what is our understanding of the position which we relatively occupy towards each other as agent and principal.

1. We to buy and sell stock in such manner as you may direct, for your account; our brokerage to be: On purchases or sales from one dollar to ninety-nine dollars inclusive, one half the commissions of the San Francisco Stock and Exchange Board. On purchase or sales at or over one hundred dollars, one half per cent. on amount.

2. You to have an overdraft, not to exceed twenty-five thousand dollars, on us, the amount of overdraft to be secured by mining stocks or other collaterals, at a margin of fifty per cent. on purchase-money. Interest the same as charged us by the bank.

3. When margins on any stock are exhausted, we to have the privilege of telegraphing to you for additional deposit; (in which case you would be justified in calling upon your principal.)

4. Upon your being advised of purchases, you will remit fifty per cent. of the amount of purchase, we to retain the stock; except when you desire the stock sent you, you will so telegraph, and we draw against you for full amount, and except when there is a balance with us in your favor, either from sales or otherwise, you will remit only the difference between your credits and fifty per cent. of purchases.

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5. On all time purchases or sales with money deposits, you to remit the twenty per cent., or the same to be deducted from your credit balance.

6. Telegrams to be at your expense and risk, except when it is our error, when we are charged with the same, and except upon telegraphic charge on your remittance, which we also pay. Any errors resulting from deficiencies in telegraph office to be at your risk. Profit or loss to be yours; we to be accountable only for such mistakes as are made in our own office. Cost of stamps and discount on exchange drawn against you to be yours.

We have given in the above, our understanding of the terms upon which we are to transact your San Francisco business. The accounts will be sent you twice in each week on specified days. In all business transactions we are to be considered as simply agents for you—you to be our principal. Should the proposition above stated be the same as you understand as the basis of our correspondence, please signify your acceptance of the same. If there be any omission or discrepancy, please notify us at an early date. At the commencement of our business, we hope you will make your overdraft as light as possible, as money is quite tight just now, and we are using quite a large amount at present in our own business.

We omitted to state that all purchases and sales shall be considered "regular," i. e. settled next day, so you can remit or draw on the morning next succeeding the day of transactions. If we sell s-3, you will have credit the day after the sale; if we buy cash, or buy s-3, and the stock is delivered the same day, you will not be charged until the day after.

Hoping to hear from you at an early day,

We remain your obedient servants,

TILDEN & BREED."

Under the agreement, Tilden & Breed bought mining stock for King when he directed, furnishing a portion of the money, and keeping in their possession the stocks purchased. The certificates were issued by different mining corporations, and were in the following form:

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"Certificate 962. No. shares, 10.

"SAN FRANCISCO, May 28th, 1868.

"Crown Point Gold and Silver Mining Company.

"This certifies that Joseph Tilden — is entitled to ten shares of the capital stock of the Crown Point Gold and Silver Mining Company. Transferable on the books of the Company by indorsement hereon, and surrender of this certificate.

"CHARLES E. ELLIOT, Secretary.

"A. HAYWOOD, President."

Most of the certificates had the word "trustee" inserted in the blank after the name of the person to whom issued. On the back of each certificate was the following:

"For value received, I do hereby sell and assign unto _____ shares of the capital stock of the within Company, standing in my name on its books.

"Witness my hand this _____ day of _____ 186 —."

The certificates of stock purchased by Tilden & Breed for King were issued by different mining corporations, and were issued to several persons. On the 31st day of August, 1868, Tilden & Breed failed, and were indebted to John Sime & Co., bankers, composed of John Sime, B. F. Hastings and Joseph M. Douglass, about thirty-five thousand dollars. They had mining stocks in their hands purchased for King, and had King's note for the balance he owed them. To secure Sime & Co. they assigned to them the stocks they had purchased for King, by filling up the blank indorsement on the back, and delivered the same, and also King's note to Sime & Co. Before this assignment was made, Sime & Co. were informed that Tilden & Breed had pledged the stocks to F. Livingstone, as security for a loan of about nine thousand dollars; and, in order to obtain the stocks, Sime & Co. allowed Tilden & Breed to draw a check on their bank for the amount due Livingstone, which they certified, and with this check Livingstone was paid, and the stocks were delivered to Sime & Co. September 1, 1868, King called on Sime & Co., and asked to see the stocks. They were shown to

Statement of Facts.

him, when he informed them that the stocks were brought for him by Tilden & Breed. Sime & Co. declined to recognize him as having any interest in the stocks. All the certificates of stock, except five shares of Belcher, and four shares of Gould & Curry, which were issued to King, and by him endorsed, and fifteen shares of Crown Point, which were issued to Tilden, stood in the names of various persons, and were by them endorsed, and none of them indicated upon their face that any person other than the possessor was the owner. King resided in Virginia, in the State of Nevada, and sent his orders to San Francisco for the purchase of the stocks. King became insolvent in July, 1868, and on the 4th day of August, 1868, settled with Tilden & Breed, and gave them his note for the balance due, twenty-nine thousand four hundred and eighteen dollars and six cents. This note Tilden & Breed, between the 1st and 5th of September, 1868, delivered to Sime & Co. as collateral security for their debt. On the 7th of December, 1868, Tilden & Breed filed their petition in bankruptcy in the United States District Court. April 21, 1870, H. C. Hyde, their assignee, brought suit against Sime & Co. to recover the stocks or their value, as the property of Tilden & Breed, converted by Sime & Co. to their use, in fraud of the creditors. June 15, 1871, that Court gave judgment in favor of Hyde for four thousand one hundred and thirty-eight dollars and fifty cents. Sime & Co. paid the judgment September 4, 1871. King was adjudged a bankrupt in the United States District Court on the 6th day of June, 1871, and the plaintiff in this action was appointed his assignee. No offer was made to pay to Sime & Co. King's note or the money they paid Livingstone, or the amount (\$35,843.38) which Tilden & Breed owed them. The complaint in this action was filed October 5, 1871, and after Sime and Hastings had appeared in the action; and on the 13th day of October following, Sime died, and defendant Toland was appointed the administrator of his estate. The administrator was made a party to the action. The stocks were worth about two hundred thousand dollars when the suit was commenced. On the

Argument for Appellant.

14th day of November, 1871, Sime & Co., Benjamin F. Hastings, surviving partner, and individually doing business under the name of John Sime & Co., were, on the petition of creditors, adjudged bankrupts, and in December, 1871, defendants White and Bradford were appointed trustees in bankruptcy of the estate of the bankrupts. The defendants recovered judgment in the Court below, and the plaintiff appealed.

The other facts are stated in the opinion.

James L. Crittenden, for the Appellant.

The Supreme Court in *Andrews v. Clerke*, a suit against brokers for value of stocks and bonds, bought for plaintiff on a margin and sold without due notice, says:

“When the stocks and bonds had been purchased by Wm. B. Clerke & Co., they were, as between them and the plaintiff, the property of the latter. The firm, by the agreement, had a right to retain and sell them, when the time arrived at which they were authorized to sell. * * The substance of the transaction is the same as if the plaintiff had himself made the purchases, and borrowed of the said firm the money required to pay for them, and then, to secure the defendants, transferred the stock and bonds to them upon the same agreement as to holding and selling them.” (*Andrews v. Clerke*, 3 Bosworth, 590; *Clarke v. Meigs*, 22 How. Pr. R. 340; *Brass v. Worth*, 40 Barb. 648; *Taylor v. Ketchum*, 5 Robertson, 507; *Read v. Lambert*, 10 Abb. Pr. R. N. S. 428, 1871; *Morgan v. Jaudon*, 40 How. Pr. R. 366, 1869; *Markham v. Jaudon*, 41 N. Y. 235, 1869.)

The Court of Appeals of New York in the case of *Markham v. Jaudon*, 41 N. Y. 235, decided, December, 1869, (a case identical with the last), in a most able and elaborate opinion, approve and sustain the decision and opinion in the case of *Brass v. Worth*. They also declare in the more recent case of *Morgan v. Jaudon*, 40 How. Pr. R. 366, the same to be the settled law in the State of New York.

In *Anderson v. Nicholas*, 5 Bosworth, 121, which was an action for damages for conversion of plaintiff's stock

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(evidence by certificates endorsed in blank) by a defendant, who was a *bona fide* purchaser for value without notice, the Court say:

“The defendant has in fact received the certificate of the plaintiff’s stock; he has employed third persons to sell it for him; it has been sold in obedience to his instructions; he received the proceeds of the sale; and he is not protected by any legal authority to do the acts so performed. This makes him liable to the owners of the stock. He has dealt with their property without their consent, and received the proceeds on a sale made by his direction. Assuming that he acted in good faith, in the belief that the stock, when he caused it to be sold, belonged to Bowen, is not sufficient to protect him. One who deals with or disposes of the property of another, the same not being negotiable, must see to it that he acts by authority of one who has title, or who has authority to confer sufficient to warrant such dealing or disposition.”

In *Read v. Lambert*, which was a suit for value of bonds bought by defendants as brokers for plaintiff, on a margin of ten per cent., and sold without orders or notice, the Court say:

“The testator contributed some money toward the purchase, but the larger portion of the price was advanced by the defendant. The legal title was in the testator.” (*Read v. Lambert*, 10 Abb. Pr. R. N. S. 428, 1872.)

“A certificate of stock is not necessary to constitute a stockholder; it is only the evidence of the stock, and we are not aware of any provision of law requiring that the owner of stock should have a certificate thereof to entitle him to vote at an election of directors of the corporation.”

Lord Ellenborough, one of England’s ablest and most learned jurists, held that an appropriation of property by a broker to his employer vested title in the employer, though it did not appear to the public at large; and that a pledge of such property by broker for advances gave no rights as against the employer of the broker. (*McCombie v. Davies*, 6 East, 588.)

We understand the burden of proving that Sime & Co.

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are such purchasers is upon the defendants. To establish this defense it is necessary that they should show, first, their *bona fides*; second, that they purchased; third, that such purchase was for value; fourth, that such purchase was made and purchase-money actually paid without notice.

This doctrine of protection of innocent purchasers for value without notice is a creature of equity origin. (*Boone v. Chiles*, 10 Pet. 210; *Morse v. Godfrey*, 3 Story's R. 390.)

The defendants plead that Tilden & Breed were indebted to them in a large sum of money, and that they received the stocks sued for "as collateral security for the payment of said indebtedness." It is nowhere set up or alleged by the defendants that they paid any money for, or made any advance upon the stocks. It is true that it is alleged that they paid a debt of T. & B. to Livingstone, but they say that it was done at the request of one Newcomb, and do not allege or pretend to allege that the stocks were either sold or pledged to them for the money so paid; but allege the contrary, by stating that they were received as collateral security for the antecedent indebtedness. Intendments are against the pleader. The utmost that the defendants have claimed is that they were pledgees of the stocks for T. & B.'s pre-existing debt to them. As a pledge is not a sale, and as there must be a sale before there can be a purchaser, it is obvious that the defendants were not purchasers. The position of a person receiving personal property as a pledge from an agent who is merely authorized to sell, is fully settled in this State by the case of *Wright v. Solomon*, 19 Cal. 64. The Court there decided that the owner could recover his property from the pledgee, even though the pledgee had made large advances of money at the very time of receiving the property, and although he believed the pledgor to be the owner. And this is the settled law in England, in all of the States, and in the United States Courts. This very question, as to stocks pledged for an advance of five thousand pounds was determined in the case of *De Bouchout v. Goldsmith*, 5 Vesey, Jr., R. 211. A number of cases supporting this rule are given above.

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The non-negotiability of certificates of stock was distinctly asserted and maintained in the following cases: *Anderson v. Nicholas*, 5 Bosworth, 121, 1859; *Anderson v. Nicholas*, 28 N. Y. 600, 1864; *Mechanics' Bank v. N. Y. & N. H. R. R. Co.*, 13 N. Y. 627, 1856; *McCreedy v. Rumsey*, 6 Duer's R. 574, 1857; *Bank of Attica v. Manufacturers' and Traders' Bank*, 20 N. Y. 507, 1859; *Nesmith v. Washington Bank*, 6 Pick. 327, 1828; *Quiner v. Marblehead Social Ins. Co.*, 10 Mass. 482, 1813; *N. Y. & N. H. R. R. Co. v. Schuyler*, 34 N. Y. 30, 1865; *Comeau v. Guild Farm Oil Co.*, 3 Daly, 218, 1850. Tilden & Breed, being simple agents, with no other authority than to sell when ordered by King to do so, could not barter or pledge King's shares of stock. Any pledge of them by Tilden & Breed would be tortious, and the holding of the pledgees would be tortious. A tender would in such case be clearly unnecessary. A mere agent, with power to sell property, cannot pledge the same even for advances at the time of delivering the property in pledge. (*Wright v. Solomon*, 19 Cal. 64; *Warner v. Martin*, 11 How. U. S. R. 209; Story on Agency, Sec. 113; 2 Kent's Com. 4 Ed. p. 625; Crump on Sale and Pledges, 1872, p. 4 to 8; *McCombie v. Davies*, 7 East, 5; *Patterson v. Tash*, 2 Strange, 1178, 1742; *De Bouchout v. Goldsmith*, 5 Vesey, Jr. 211, Stocks pledged; *Guichard v. Morgan*, 4 Moore, 36, 1819; *Gill v. Kymer*, 5 Moore, 516, 1821; *Bragg v. Meyer*, 1 McAllister, 408, 1858.) Still less could the agent pledge when his power was merely to hold and sell only when ordered by the principal. Such was the position of Tilden & Breed under their contract. If Tilden & Breed had a lien on the stocks for their advances, the lien was a personal one and could not be transferred to another person. Such a transfer would terminate the lien and release the property from any claim on account of such lien. This proposition of law is too well settled to require argument, and we merely refer to a few of the many authorities which establish it. (*Daubigny v. Duval*, 5 Dunford & East's R. 606; *McCombie v. Davies*, 7 East, 5; *Scribner v. Maston*, 11 Cal. 303.)

Argument for Respondent.

Calhoun Benham, also for the Appellant, confined his opening argument to questions arising upon the issues raised in the pleadings, and to the special issues submitted to the jury, and their findings thereon, and to alleged errors in admitting and refusing evidence.

G. W. Gordon and *Williams & Bixler*, for Respondent Toland; *John B. Harmon* and *Williams & Thornton*, for the other Respondents.

Tilden & Breed having transferred to Sime & Co., King's note for twenty-nine thousand four hundred and eighteen dollars and six cents, and accompanying stock, as security for the debt of Tilden & Breed to Sime & Co., no action lies against Sime & Co. for the stocks, without first paying or tendering to them the amount of said note; and this, independent of the negotiability of the certificates of stock, and independent of King's ownership, or Sime & Co.'s notice thereof, which in this branch of the case, is a false quantity. (Tyler on Usury, Pledges and Pawn, pp. 567 to 574, inclusive; Schouler on Personal Property, 523, 4, 5; *Halliday v. Holgate*, 3 Exqr. L. R. 299; *Donald v. Suckling*, 1 L. R. Q. B. 584; *Lewis v. Mott*, 36 N. Y. 395; *Johnson v. Stear*, 15 C. B. Rep. N. S. 336; or 109 E. C. L. Repts. 330; *Bloxum v. Saunders*, 4 Barn. & Cress. 941; *Winks v. Hassall*, 9 Barn. & Cress. 372; *Jones v. Rahilly*, 16 Minn. 321; *Jarvis v. Rogers*, 13 Mass. 105.) Sime & Co. having paid Livingstone nine thousand one hundred and forty-four dollars, for which most of the stocks in controversy were pledged to him by Tilden & Breed, became subrogated to his rights, which was that of a holder for value without notice, and no action lies against Sime & Co. for the stocks without payment or tender. This, too, regardless of the question of notice of the equitable rights, if any, in King. (Same authorities cited.)

The stocks were transferable by endorsement and delivery, just as negotiable paper, and Sime & Co. having obtained them from Tilden & Breed, as security for a debt from the latter to the former, of thirty-five thousand eight hundred and forty-three dollars and fifty-eight cents, with-

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out notice of King's claim, no action lies against Sime & Co. for the stocks, without first paying or tendering the amount of such debt, which the jury finds was not done, and plaintiff does not pretend was even attempted. (*McNeil v. Tenth National Bank*, 46 N. Y. 325; *Brewster v. Sime*, 42 Cal. 139, and cases cited; 1 Hittel, Art. 943; 2 Parson's Notes and Bills, 42-3; *Goldstein v. Hart*, 30 Cal. 375 bottom, 376 top; *Donald v. Suckling*, 1 Law Reports Q. B. 584, 616; *Halliday v. Holgate*, 3 Exqr. 299; *Johnson v. Stear*, 109 E. C. Law, 332; Story on Bailment, Sec. 327; *Leitch v. Wells*, 3 Sickles, 585.) The suit of Hyde, assignee, in bankruptcy of Tilden & Breed, against Sime & Co., was a former recovery by King's bailees, Tilden & Breed, and bars this action by King's assignee in bankruptcy. Tilden & Breed, if not the owners of these stocks themselves, were the pledgees of them from King. As such pledgees, they had the right to sue for any conversion of them, and recover the whole value thereof, and such recovery is a good answer to any subsequent suit by the pledgor. (*Treadwell v. David*, 34 Cal. 606; *Green v. Clarke*, 2 Kern, 343, 354; *Casey v. Suter*, 36 M. D. 1; *Chicago R. Co. v. Shultz*, 55 Ill. 423; *Betts v. Mouser*, Wright's Ohio, 745; *Dillenback v. Jerome*, 7 Cow. 300; *City of St. Louis v. Bissell*, 46 Mo. 157.)

Counsel on the other side claim that the Hyde suit was only to set aside the transfer of Tilden & Breed to Sime & Co., on the ground of a fraudulent preference, and hence it was not for the same cause of action.

But the action of the Bankrupt Court, under the circumstances, was *quasi in rem*. The possession, right of possession, and legal title of the stocks were in Tilden & Breed, and not in King, on the 31st of August, 1868. At most, King had a mere right to redeem. This property in Tilden & Breed passed to Hyde, as assignee, with all its incidents, and could be adjudicated by the U. S. District Court in Bankruptcy. (*Garwood v. Garwood*, 29 Cal. 272; *McCullough v. Clark*, 41 Cal. 302; *Canjolle v. Ferrie*, 13 Wallace 474; 2 Smith's Ld. Cases, 7 Amer. ed. pp. 808-822; on Estoppels *in rem*, *Duchess of Kingston's case*; *Scott v. Sherman*, 2 Wm. Blackstone, 978.)

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Calhoun Benham, in reply to respondent's point that the plaintiff could not recover without a tender, argued that Sime & Co. were not the owners of the note at the trial, and never were; and a payment of it by King to defendants or to Sime & Co. would not have been a satisfaction of the note. Tilden & Breed did not transfer the note to Sime & Co. as security for their debts to Sime & Co. And, if they did, the transfer was void, as they were insolvent. And if they had so transferred it, Sime & Co. could not have claimed its payment, because they were not owners or holders of it at any time after they surrendered it to Hyde.

That there was no presumption in law that Livingstone had a valid pledge. *Omnia presumuntur rite acta* does not apply to private individuals.

Also, in reply to respondent's point that the stocks were transferable by indorsement and delivery, he said, this is not an open question. Here was *mala fides* — a taking by fraud. Stocks are not negotiable, though they pass by indorsement and delivery. Sime & Co. would not have been innocent purchasers or pledgees, *quoad* Tilden & Breed's debt to them, even though the stocks had been negotiable paper, and actually pledged for the old debt, and they had not had notice of King's title.

They parted, according to the theory of this point, with nothing—securities or anything else—as the transfer was a nullity as to Sime & Co., with not even their right to any particular judicial process, which at least is necessary under the rule in California. (*Weaver v. Barden*, 49 N. Y. 286; *Morse v. Godfrey*, 3 Story, 389, and cases heretofore cited; *Payne v. Bensley*, 8 Cal. 260; and *Robinson v. Smith*, 14 Cal. 94.

By the Court, CROCKETT, J.:

In the view we take of this case, it will be unnecessary to consider many of the points which have been elaborately discussed by counsel. There is no conflict in the evidence to the effect that when the stock certificates in controversy were delivered to Sime & Co., as collateral security for the indebtedness of Tilden & Breed, they were properly en-

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dorsed, so as to pass by delivery. There was nothing on the face of them to raise a suspicion that they were not the property of Tilden & Breed; and the jury finds, on evidence substantially conflicting, that Sime & Co. received the certificates in good faith, and without notice of King's alleged equities. We, therefore, cannot disturb the verdict on this point. The jury also finds that the certificates were delivered to Sime & Co. with the consent of Tilden & Breed, as collateral security for the indebtedness of the latter firm to the former, for a sum exceeding thirty-five thousand dollars, no portion of which has been paid or tendered. We think the evidence warranted this finding, and that Tilden & Breed assented to the delivery of the certificates and their hypothecation, as above stated. King had permitted the certificates to remain in the hands of Tilden & Breed, indorsed in such manner that they would pass by delivery, and with nothing on their face to indicate that he had any interest in them, or that they were not the property of Tilden & Breed, whom he has clothed with all the usual *indicia* of the ownership of mining stocks. He had placed them in a position to deal with the stocks as though they were the absolute owners. They could at any time have caused them to be transferred on the books of the respective mining corporations into their own names, and any purchaser or pledgee holding under them could also have done so. If they had no right under the contract between them to sell or hypothecate the stocks except with his consent, he nevertheless clothed them with such an apparent ownership as to mislead the public, and to enable Tilden & Breed to hold themselves out as the owners, and thus defraud innocent persons dealing with them in good faith. Under such circumstances, the party who places another in a position to enable him to practice the fraud should suffer the loss rather than an innocent person who deals with him on the faith of the usual *indicia* of ownership with which the true owner has invested him.

If King had desired to preserve his alleged rights, and to prevent an abuse by Tilden & Breed of the secret trust on which it is claimed they held the stocks, he should have

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seen to it that the nature of the trust appeared on the face of the certificates, or in some other method have placed it out of their power to deal with the stocks as their own. In this State, mining stocks, properly indorsed, pass by delivery almost as currently as bank notes; and if the true owner places them, or knowingly allows them to remain in that condition in the hands of another, on some secret trust between them, he, and not an innocent purchaser or pledgee, must bear the loss resulting from a breach of the trust. This point was substantially decided in *Brewster v. Sime*, 42 Cal. 139, and we see no reason to doubt the correctness of the proposition. We are, therefore, of opinion that the transaction between Sime & Co. on the one side, and Tilden & Breed on the other, is to be treated, for the purposes of this action, as though the latter had the absolute right as against King, to pledge the stocks on the 31st of August, 1868, when they were hypothecated. It appears, however, that the District Court of the United States, in an action between the assignee in bankruptcy of Tilden & Breed as plaintiffs and Sime & Co. as defendants, held the hypothecation to the latter, under the circumstances, to be a fraud upon the bankrupt law, and, therefore, void as against the other creditors of Tilden & Breed. It, therefore, compelled Sime & Co. to account to the assignee for the value of the stocks. But this cannot improve the status of the plaintiff in this action. Though void under the bankrupt law as against the other creditors of Tilden & Breed, the transaction was valid as against King and every one else; and when Sime & Co. paid to the assignee of Tilden & Breed the value of the stocks, they thereby acquired whatever title the assignee had to them. The effect of the satisfaction of that judgment was to vest the title of the assignee in Sime & Co. But so far as King's rights are concerned, they are no greater than they were before. The case then resolves itself into this: that Sime & Co., in good faith and without notice of King's alleged equities, received these stocks from Tilden & Breed, who were the apparent owners, with the usual *indicia* of ownership, as a pledge to secure the payment of a subsisting debt, which has never been paid or

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tendered. Under these circumstances, King's alleged rights, founded on the secret trust between himself and Tilden & Breed, are subordinate to those of the pledgee's. It remains to be considered to what extent, if at all, King's rights are affected by the fact that Sime & Co. sold a portion of the stocks and converted them to their own use, without a previous demand and notice. As we have seen, the stocks are to be deemed as against King, to have been held by Sime & Co. under a valid pledge to secure a debt due from Tilden & Breed.

If Sime & Co. have unlawfully sold and converted the stocks without a previous demand and notice, it was the rights of Tilden & Breed, the pledgors, and not those of King, which were injuriously affected. The contract of pledge was between Sime & Co. and Tilden & Breed; and the right of action for violation of the contract or a breach of duty by the pledgee, was in the pledgors and not in a stranger to the transaction.

It is a sufficient answer to any action by King founded on his supposed rights, if any he has outside of the contract of pledge between Sime & Co. and Tilden & Breed, that the stocks were held under a pledge which was valid as against him, and to which he was a stranger, and that the debt for which they were pledged has not been paid or tendered.

Among the numerous rulings of the Court below, which the plaintiff claims to have been erroneous, we discover no error which could injuriously affect the plaintiff in the view we have taken of the case.

Judgment and order affirmed.

By the Court, CROCKETT, J., on petition for a rehearing.

A rehearing is asked on the ground that by the contradicted testimony of Newcomb, when Sime & Co. received the stocks, and particularly those pledged to Livingstone, Sime had express notice that they belonged to King. The jury found otherwise; and it is insisted that the verdict on this point is not only wholly unsupported by any evidence in the cause, but is directly con-

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trary to the testimony of Newcomb. It is to be observed, however, that Sime died pending the action, and his testimony was not obtained. The only evidence of express notice to Sime is to be found in the testimony of Newcomb, relating to a conversation between them at which no one else was present. The conversation occurred on the day of the failure of Tilden & Breed, and amidst the confusion and excitement naturally attending such an event. It was a conversation between a clerk of the bankrupt firm and one of its creditors for a large sum, eagerly in search of information as to its assets. Evidence of a conversation, resting only in the memory of a single witness, is ordinarily the most unsatisfactory of all evidence. Conversations are so easily misunderstood, particularly under circumstances of excitement, and the human memory is so treacherous, that testimony of this character is held by all courts to be the weakest of all evidence. Moreover, Newcomb was contradicted by Hastings in respect to some of the circumstances attending the giving of the check to redeem the stocks from Livingstone, and on his cross-examination he testified that Sime & Co. "knew from me that the stocks in Livingstone's possession belonged to King, or a portion of them, anyway; but I don't testify, and I have not testified that I told them in so many words that they were King's stocks." Under these circumstances, while there is nothing to impeach his integrity, we cannot say that the jury was not authorized to distrust the accuracy of Newcomb's recollection of the conversation. It was incumbent on the plaintiff to prove notice to Sime & Co. of King's equities; and, under the circumstances already stated, it was for the jury to determine whether the evidence on this point was sufficiently satisfactory to establish affirmatively the fact of the notice. Their finding being in the negative, we would not be justified in setting aside the verdict on the ground that it is unsupported by the evidence. But, waiving this question, we think the judgment ought to be affirmed on another ground. There can be no doubt that Tilden & Breed were entitled to hold the stocks as collateral security for King's note. The note

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itself, and the stocks as collateral security for its payment, were delivered to Sime & Co., as collateral security for the indebtedness of Tilden & Breed. It cannot be doubted that Tilden & Breed, the holders of King's note, had the right to pledge it to Sime & Co., and to deliver to them, as collateral security for the note, the stocks held in pledge to secure its payment. Though this transaction was held to be a fraud on the Bankrupt Law as against the creditors of Tilden & Breed, and void as against them, it was nevertheless, valid as against King. As to him, Sime & Co. became the lawful holders of the note, and of the stocks, as collateral security for it. As pledgee of the stocks, holding them for the security for King's note, it would not have been incumbent on them, upon a redemption of the pledge, to return to the pledgor the same identical certificates which they had received, but it would have been a sufficient discharge of their duty as pledgees to have kept on hand, and to have been ready at all times, on a redemption of the pledge, to restore to the pledgor certificates of stock corresponding to those received of the pledgor. (*Atkins v. Gamble*, 42 Cal. 86; and cases there cited.) The mere fact, therefore, that Sime & Co. had sold these particular certificates, did not of itself render them liable as for a conversion of the pledge. If they had continued to be the holders of King's note, he could not have put them in default, except by a tender of payment and a demand for the stocks; and they would not have been in default, if upon such tender and demand they had offered to restore to them other similar certificates, and had shown that they had at all times been ready to do so. But he could not have maintained the action without a tender and demand. It appears, however, the District Court of the United States held the transaction between Sime & Co. and Tilden & Breed, to be void as against the creditors of the latter, and compelled Sime & Co. not only to surrender the note, but to account for the value of the stocks. The effect of this decree was to adjudge that as between the assignee of Tilden & Breed and Sime & Co. there had been no valid pledge of King's note, and the stocks as collateral

security for its payment. In other words, it restored the note to the assignee with the same rights as though Tilden & Breed had never attempted to pledge it to Sime & Co. But in the meantime, Sime & Co. had disposed of the stocks and converted the proceeds to their own use. In whom was the right of action for the conversion? Was it in King, or in the assignee of Tilden & Breed as the holder of King's note, and as pledgee of the stocks to secure its payment? In *Treadwell v. Davis*, 34 Cal. 606, we had occasion to consider the question, whether the pledgee, in an action against a stranger for a conversion of the pledge, was entitled to recover the value of the pledge, or only the value of his special interest in it. We say, "the rule appears to be well settled that in an action by the pledgee against a stranger for the conversion of goods, the plaintiff is entitled to recover the full value of the goods, because he is answerable over to the pledgor for the surplus. But if the goods be converted by the owner, or by any one acting in privity with him, the pledgee can recover only the value of his special interest in the pledge;" and we cite in support of this proposition, Story on Bailment, Sec. 352; *Lyle v. Barber*, 5 Bin. 457; *Heyden & Smith's Case*, 6 Coke, 486; *Ingersoll v. Van Bokkelen*, 7 Cow. 670; *Pomeroy v. Smith*, 17 Pick. 85, to which many other authorities might be added. Assuming this to be the correct rule (of which we have no doubt), the assignee of Tilden & Breed, as pledgee of the stocks, was entitled to recover their full value from Sime & Co., who, on the plaintiff's theory, were strangers to King, and not acting in privity with him. The complaint charges them to be naked wrong doers, who wrongfully and fraudulently obtained possession of the stocks, without the knowledge or consent either of King or Tilden & Breed; and the plaintiff now contends that they wrongfully and unlawfully obtained possession of the stocks, and converted them to their own use, with full notice of King's rights. If this be so, they were wrong doers, and could not have acted in privity with King. In an action against them, the assignee of Tilden & Breed, as pledgee of the stocks, was therefore entitled to recover their full

Points decided.

value as he appears to have done. The effect of this recovery and the satisfaction of it by Sime & Co., was to vest in them a title to the stocks or their proceeds. In any event, it cannot be doubted that the assignee of Tilden & Breed, as pledgee of the stocks, was entitled to recover the value of his special interest in them; and it appears that the stocks, at the time of their conversion, were worth much less than the debt for which they were pledged to Tilden & Breed. This value was ascertained by the judgment of the Court, and was paid by Sime & Co. to the assignee of Tilden & Breed. No interest was left in King on which he or his assignee could maintain an action against Sime & Co. The point is made that the proceedings in the Bankruptcy Court were not admissible in evidence under the pleadings; but we are of a contrary opinion.

The petition for a rehearing is denied.

Mr. Justice McKINSTRY did not express an opinion on the application for a rehearing.

Mr. Chief Justice WALLACE, being disqualified, did not participate in the decision of this case.

[No. 3,495.]

JOSE DOLORES GUERRERO ET AL. v. BARTOLO
BALLERINO.

AN ADMINISTRATOR A PURCHASER AT HIS OWN SALE.—Case stated where the evidence shows that an administrator, through another person, was the purchaser at the sale of the intestate's land, made by himself, and where the finding of the Court below, that the administrator was not the real purchaser, is set aside as being not sustained by the evidence.

IF ADMINISTRATOR BUYS AT HIS OWN SALE, HE BECOMES A TRUSTEE.—If an administrator becomes a purchaser, through another person, of the land of the estate sold by him, the heirs of the intestate may have him declared a trustee, and compel him to convey the land to them.

APPEAL from the District Court, Seventeenth Judicial District, County of Los Angeles.

Statement of Facts.

Vicente Guerrero, on the 25th day of March, 1861, was the owner of a lot of land in the city of Los Angeles, and, on that day borrowed of the defendant fourteen hundred dollars, and to secure the same, gave the defendant a mortgage on the lot, and gave his promissory note, bearing interest at two per cent. per month, payable on or before the 1st day of November following. On the 16th of November, 1861, Guerrero, the note not having been paid, gave the defendant possession of the lot and buildings thereon, under the agreement that the defendant should collect the rents, and out of the same pay the taxes and repairs, and credit the balance on the note.

In March, 1865, Guerrero died, leaving four children, three sons and a daughter. Afterwards, and in 1865, the daughter died, leaving four children. The three surviving sons and the children of the deceased daughter were the plaintiffs here. The defendant, in May, 1865, was appointed administrator of Guerrero's estate. He filed the note and mortgage as a claim against the estate, giving credits thereon for rents received, and it was allowed by the Probate Judge to the amount of one thousand eight hundred and ten dollars and fifty cents. There were no other claims, except the expenses of administration. On the 10th of September, 1866, he filed a petition for the sale of the mortgaged premises, procured from the Probate Court an order of sale; and, on the 23d day of January, 1868, the administrator filed his report of the sale, in which he stated that he had sold the lot on the 7th day of March, 1867, at public auction, to H. J. Yarrow, for the sum of one thousand nine hundred dollars. On the 3d day of February, 1868, the Probate Court affirmed the sale. The administrator's deed to Yarrow was dated February 7, 1868, acknowledged June 12, 1868, and recorded July 17, 1868. Yarrow deeded the lot to the administrator Dec. 16, 1868, and the deed was recorded March 31, 1870. On the 19th day of October, 1869, the defendant filed his final account, and the same was approved, and the defendant discharged October 25, 1869.

This was a bill in equity, filed December 27, 1871, to

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have the defendant declared a trustee, under allegations that, although Yarrow was the nominal purchaser at the administrator's sale, yet he purchased for the defendant, who was therefore a trustee, and should convey to the plaintiffs. There were allegations that the note had been paid by the rents, and the Court was asked to take an account of the amount, if any, due to the defendant. The plaintiff, José Dolores Guerrero, was a minor during the probate proceedings, and was twenty-two years old when the bill was filed. On the trial the defendant claimed that he had loaned Yarrow two thousand dollars after the administrator's sale, and that he paid him three thousand dollars for the property when he bought it. The Court below rendered judgment for the defendant, and the plaintiffs appealed.

The other facts are stated in the opinion.

Glassell, Chapman & Smith, for the Appellants, argued that the proper construction of the one hundred and ninety-third section of the Probate Act, forbid an administrator from purchasing the estate at his own sale, even though a *bona fide* purchaser, and that the burthen of proof was on the administrator, to show that the purchase was not made for his benefit when he bought the property from the purchaser at his sale; and cited *Michod v. Girod*, 4 How. U. S. 553; *Miles v. Wheeler*, 43 Ill. 126; *Davoue v. Fanning*, 2 Johns. Ch. 252, and *Moore v. Moore*, 5 N. Y. 257. They also argued that the evidence showed that the administrator was the real purchaser through Yarrow, the nominal one, and in relation to his suppression of his books of account, cited 1 Phil. on Ev. 447-8; 1 Green. on Ev. Sec. 37, and Broom's Legal Maxims, 693.

Stanford & Ramirez, and *V. E. Howard & Sons*, for the Respondent, argued, that it devolved on the plaintiffs to make out their case, and that the evidence sustained the findings of the Court below, and that the complaint was without equity, because it did not offer to pay the mortgage and expense of administration, and did not tender back the purchase-money.

By the Court, McKINSTRY, J.:

It was important to ascertain whether the defendant, administrator, was directly or indirectly the purchaser at his sale of the intestate's land. (Probate Act, Sec. 193; *Boyd v. Blankman*, 29 Cal. 19.) The Court below found in effect that he was not.

I am authorized to say that all the Justices of this Court are of the opinion that the finding is against the evidence.

The administrator's sale took place on the 27th of March, 1867, but was not confirmed by the Probate Court until February, 1868. More than five months elapsed after the confirmation before the deed to Yarrow, the nominal purchaser, was recorded. The conveyance from Yarrow to the defendant was made one month and twenty days after the discharge of the latter as administrator.

The nominal purchaser from the administrator is dead; and the defendant finds himself unfortunate in the circumstance, that no third person was present when one thousand nine hundred dollars — the alleged purchase price — was paid by Yarrow to him; when the two thousand dollars was loaned by him to Yarrow, or when the additional one thousand dollars was paid to make up the consideration for the re-conveyance.

He may also regret the omission, sworn to by him, to make any entries in his books of account, or any written memorandum of the transfer of moneys between Yarrow and himself. The omission perhaps would have been supplied, had the defendant been able to recover the book, which, on the first day of the trial, he stated he had in his possession, but which on the next day he declared was lost. The defendant says this book (which he admits he showed to the witness, Cohen) contained only an account for groceries furnished by Yarrow; but Cohen testifies that the book was a general account book, not confined to groceries, but extending to moneys, rents, charges for taxes — being a general running account.

It is true Yarrow paid the taxes on the property, while the apparent legal title stood in him; but the evidence

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proves that he charged the sums so paid to the defendant. The defendant admits that he continued to collect the rents after the sale and conveyance to Yarrow; but says he paid them over to him for a month or so, when he loaned Yarrow two thousand dollars. He testifies that the latter gave his note for this sum, bearing no interest, and that he — the defendant — was to collect and keep the rents as payment for the use of the money; that Yarrow claimed that defendant should pay the taxes out of the rents received; to which defendant demurred, and thereupon demanded his two thousand dollars. The money not being repaid, the defendant offered Yarrow an additional one thousand (three thousand dollars in all) for the property, which the latter accepted. The property does not appear to have been worth more, when re-conveyed, than when sold to Yarrow, at which time, as shown by defendant's witnesses, one thousand nine hundred dollars was its full value. Defendant testifies that he was at Yarrow's store when he paid the last one thousand dollars, gave up the note for two thousand dollars, and took the deed of conveyance to himself. F. Howard and B. Nicolet subscribed the deed as witnesses, but were not present when the money was paid.

Many of the statements of the defendant are, in themselves, highly improbable; when his narrative brings him to events which, according to ordinary experience, should be known to others, he is uncorroborated; in an important respect he contradicts an allegation of his verified answer; in one matter of consequence he is contradicted by the witness Cohen; and, if we can attach any credibility to the testimony of the plaintiff, Dolores Guerrero (not directly denied,) the defendant seemed anxious to affirm the sale to Yarrow, when it was suggested that a larger sum could be realized.

Judgment and order denying new trial reversed. Remittitur forthwith.

Opinion of the Court — Rhodes, J.

[No. 10,077.]

PEOPLE v. NOREGEA.

POSSESSION OF STOLEN PROPERTY.—In order that the possession of stolen property may be made available toward a conviction, other circumstances indicative of guilt must be shown.

ERROR AGAINST APPELLANT.—Error, in excluding evidence against a defendant offered by the people, cannot be taken advantage of by counsel for the people, upon an appeal by the defendant.

APPEAL from the County Court of Solano County.

The defendant appealed. The other facts are stated in the opinion.

J. M. Coghlan and *G. A. Lamont*, for Appellant.

Attorney-General Love, for Respondents.

By the Court, RHODES, J.:

The defendant was convicted of grand larceny, for the stealing of a horse. The only evidence of defendant's guilt was that the stolen horse was found in his possession a few hours after it was taken. *People v. Chambers*, 18 Cal. 382; and *People v. Ah Ki*, 20 Cal. 178, hold that the possession of stolen property is a circumstance to be considered by the jury, but it is not, of itself, sufficient to warrant a conviction. It is said by Greenleaf (3 Greenl. Ev. Sec. 31:) "It will be necessary for the prosecutor to add the proof of other circumstances indicative of guilt, in order to render the naked possession of the thing available towards a conviction." The evidence discloses no circumstances of that character. The riding of the horse several miles beyond the point where he was first seen in possession of it, is only his continued possession of it, and is not a further circumstance indicative of guilt. The leaving of the saddle with the innkeeper does not tend to prove a larceny of the horse.

There may be an abundance of authority to sustain the point of the Attorney-General, that the Court erred in ex-

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cluding evidence as to the defendant's confession, after the preliminary evidence as to its having been voluntary; but the point does not arise on the defendant's appeal.

Judgment reversed and cause remanded for a new trial. Remittitur forthwith.

Neither Mr. Chief Justice WALLACE nor Mr. Justice McKINSTRY expressed an opinion.

EDGAR MILLS AND PARROTT & CO. v. JOHN BELLMER, S. B. MOORE, L. UPSON AND W. L. UHLER.

DUTY OF OFFICERS WHO ADVERTISE FOR BIDS.—When a County Treasurer is authorized by statute to advertise for bids for the surrender of County bonds, in order that he may redeem them with money in the treasury, he has no authority, in the advertisement, to insert a condition upon which bids will be received, which is not to be implied from the duty to advertise, and which is not necessary to the exercise of his authority: such as that the bonds must accompany the bid; and it is his duty to accept the most favorable bid, even if not accompanied by the bonds.

APPEAL from the District Court of the Sixth Judicial District, Sacramento County.

The case arose upon the construction of section thirty-nine of the Act of April 24, 1858, to incorporate the City and County of Sacramento, etc. (Statutes 1858, p. 284.) The section referred to, so far as material to the question involved, is as follows:

“Whenever, in any year, there remains in either of the interest or sinking funds mentioned in section thirty-five or thirty-six of this Act, a surplus of one thousand dollars or more, after paying the interest in accordance with the provisions herein specified, it shall be the duty of the Treasurer to advertise for twenty days, in one of the daily papers published in the City of Sacramento, stating the amount in each fund to be disposed of, and that he will receive sealed proposals for the surrender of bonds issued under the authority of this Act; said proposals to be opened in the presence of the President and Clerk of the Board of

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Supervisors, five days after expiration of said published notice, and they shall accept the lowest public proposals, at rates not exceeding par value, as may redeem the greatest amount of bonds, until the amount of cash on hand for redemption is exhausted."

It appeared that on January 20, 1874, the defendant Bellmer, as Treasurer of Sacramento County, advertised in one of the daily newspapers of the City of Sacramento that there was in the sinking and interest fund thirty-four thousand dollars to be awarded to the person or persons who would surrender the greatest amount of the funded debt of 1859, and that bids, with the bonds inclosed, would be received until a day named in the advertisement, but no bids would be received unless accompanied by the bonds. Upon opening the proposals the following bid was found:

"LONDON AND SAN FRANCISCO BANK (LIMITED), }
SAN FRANCISCO, February 11th, 1873. }

"John Bellmer, Esq., Treasurer of Sacramento County: I hereby agree to deliver for redemption County Bonds of the funded debt of 1859, in any amount not less than twelve thousand dollars, nor more than thirty-two thousand dollars, at the rate of nine hundred and forty-nine dollars per thousand.

"WILLIAM L. UHLER.

"N. B. Your advertisement requires the bonds to accompany the bid. These bonds are in the East, and I do not wish to incur the risk of having them sent on unless I know they are to be redeemed. If my bid is accepted, I will telegraph for them upon notification of it, and deliver them within ten days (in all probability). If required, I will get this bank to give the necessary security that they will be delivered as promised.

"Yours,

WILLIAM L. UHLER."

Another bid was received from the plaintiffs, inclosing the bonds, but the bid of Uhler was more favorable for the public by some one thousand seven hundred dollars, and he subsequently appeared before the defendants by an agent, and offered to give security that the bonds would be

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placed in the hands of the defendant Bellmer within ten days, if the bid should be accepted. Thereupon, the defendants, except Uhler, being in doubt as to their duty in the premises, an agreed case was submitted to the District Court for its decision as to which bid should be accepted. The defendant Moore was President of the Board of Supervisors, and the defendant Upson was Clerk of the Board.

The Court rendered judgment for Uhler, and the plaintiff appealed.

George Cadwalader, for the Appellant, argued that Uhler's bid was void because it did not conform to the notice; and cited *Burns v. Wheaton*, 46 Mo. 363; Fry on Spec. Per. Sec. 167; that Bellmer's authority was to be so construed as to include all necessary or usual means of executing it with effect, (Story on Agency, Sec. 60; Paley's Agency, 189, 208; *United States v. Wyngall*, 5 Hill, 16, 19); and that the condition imposed in the advertisement being intended to get rid of straw bids, was not to be presumed unreasonable.

McKune and Welty, for Respondent, cited the statute, and argued that the condition imposed was not binding, because not authorized by law.

The COURT held that the bid of Uhler was entitled to be considered, notwithstanding it was not accompanied by the bonds therein referred to. It was of opinion that Uhler, being the most favorable bidder, his bid should have been accepted upon the express provision of the statute, and that the Treasurer had no authority to impose upon bidders conditions of the character here attempted, whereby it might occur that a bid the most favorable to the public, and made in conformity to the actual requirements of statute, would, nevertheless, be rejected, because of non-compliance with some condition imposed by the ministerial officer to whom the duty of merely advertising for bids was committed by the statute. The Court was of opinion that the power to impose the condition here attempted was not to be implied from the duty to advertise, because the condition imposed by the officer was not only not necessary to the exercise of his authority, but wholly foreign to it.

The judgment was affirmed.

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[No. 3,833.]

EDWARD DALEY, ELLIS AMES, AND TWENTY OTHERS,
v. A. J. COX, LOUISA MORSE, AND H. MORSE, HER
HUSBAND.

WATER COMMISSIONERS.—The Board of Water Commissioners for San Bernardino County, created under the Act of February 18, 1864; are merely agents selected for the public convenience, to regulate the distribution of water according to the rights of the parties in interest; but their action in distributing water, does not prevent the parties from applying to the Court for, nor the Court from granting relief, if to any one is distributed more than his just proportion of the water.

APPEAL from the District Court, Eighteenth Judicial District, County of San Bernardino.

The case shows that, many years ago, several parties united in locating and constructing a dam and ditch, to raise the water in a certain arroyo, and to convey it on to their land in San Bernardino for irrigation. The lots appear to have contained one acre of land each, or that amount of land was the standard used in making calculations about the quantity of water each person was entitled to. The plaintiffs claim that there were fifty-one of these lots. Each owner performed labor and bore expenses in proportion to the number of his lots to be irrigated. Fifty-one was the original number of shares, but in 1862, the dam was re-built, and the defendants claimed that at the time of re-building, by common consent, additional shares were allotted to them, so that the shares were increased to fifty-four, and that they performed labor for the additional shares. The method of distributing the water was this: Divide the number of hours in a week by the number of shares, and the quotient will be the number of hours in a week which a share was entitled to use the water in the ditch. If one share was entitled to water six hours in a week, the owner of two shares was entitled to use it twelve hours in a week. The Board of Water Commissioners made the apportionment as the defendants claimed it should be, and

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the plaintiffs brought this action, asking the Court to determine the right of the parties, and to restrain the defendants from depriving the plaintiffs of their just proportion of the water.

The defendants appealed. The other facts are stated in the opinion.

Henry M. Willis and *W. C. Wiseman*, for the Appellants, argued that, by the Act of March 6, 1857, (Statutes of 1857, p. 63), and the amendments thereto, approved February 18, 1864, (Laws 1863-4, p. 87), the Commissioners were to apportion the water each year, and that the amount of water to be used by each person was not fixed and absolute, but might vary each year, as a larger area of ground was cultivated, and that this was under the control of the Board of Water Commissioners, and the Court could not interfere.

B. B. Harris, for Respondents, argued that, if the Board of Water Commissioners could take one man's proportion of the water and bestow it upon another, it would be the exercise of judicial power, and violate Article VI, section six, of the Constitution, and that the Board possessed no power except to see to a distribution of water, according to the rights of the parties.

Willis, for the Appellants, in reply, argued that the Board exercised powers *quasi* judicial, like a Board of Supervisors, and that their orders could not be reviewed in a collateral proceeding.

By the Court, CROCKETT, J.:

This is an action to determine the relative proportion in which the plaintiffs and defendants are entitled to use, for purposes of irrigation, the waters of a certain ditch in San Bernardino County. The complaint avers that the ownership of the ditch is divided into fifty-one shares; of which forty-eight belong to the plaintiffs, one to the defendant Cox, one to the defendant Louisa Morse, and one to the estate of Rich; and that the several owners are entitled to use the water in these proportions and not otherwise. But,

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it avers, the defendants are using, and claim the right to use, a larger proportion than they are rightfully entitled to, thereby depriving the plaintiffs of their just share of the water. The answer admits the joint ownership of the ditch, but avers that it is divided into fifty-four instead of fifty-one shares; of which the plaintiffs severally own in the aggregate forty-eight shares, the defendant Cox three, Morse two, and the estate of Rich one share. This presents a mere issue of fact as to the number of shares in the ditch; and the Court below, on conflicting, and, we think, sufficient evidence, found the issue in favor of the plaintiffs. This practically disposes of the case. But the defendants contend that under the Act of February 18, 1864, creating a Board of Water Commissioners for San Bernardino County (Statutes 1863-4, p. 87), that Board has the exclusive right to determine the proportions in which the waters of the ditch shall be distributed to the proprietors; and there was put in evidence at the trial an order of the Board authorizing Cox to take from the ditch a quantity of water representing three shares, and Morse a quantity representing two shares. The second section of the Act is relied upon as conferring upon the Board an exclusive right to determine such matters, whose decision, it is claimed, cannot be reviewed in the Courts. This Act affords a striking example of improvident, crude legislation. Its provisions are so vague, its language so obscure, its whole structure so loose and disjointed, that we can scarcely hope to deduce from it any very satisfactory conclusion as to its meaning. The second subdivision of section two is in these words:

“Upon a petition of a majority of those interested, or who own legitimate claims on any ditch, they (the Board of Commissioners) shall lay out any ditch or ditches and apportion the water thereof among the persons using the same, in proportion to the amount of land each person may wish to irrigate; provided, there should be water sufficient in said ditch for the irrigation of all said land. But in case there should not be a sufficient amount of water for said irrigation in any such ditch, upon a petition of a majority

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of those holding such interests as aforesaid, the Water Commissioners shall immediately re-apportion, without prejudice to any prior occupation the water thereof; and any person who shall have put in for more land to irrigate than his proportion, according to the *pro rata* of water in the ditch or stream from which he is furnished with water, a re-apportionment shall immediately be made as provided in this section."

So far as we are able to extract any intelligent meaning from this obscure and confused language, construed in connection with the remainder of the Act, it is, that on the petition of a majority of those interested in a proposed ditch, the Water Commissioners shall locate and lay it out; and when it is constructed the commissioners shall apportion the water amongst those interested according to the amount of land each shall desire to irrigate; provided, there is sufficient water to irrigate all the land; but if not sufficient for the whole, the commissioners, on the petition of a majority of those interested, shall re-apportion the water, assigning to each his proper quantum. It is provided, however, that this shall be done "without prejudice to any prior occupation." We are unable to comprehend this clause, in the connection in which it is used, and shall reject it as meaningless. The next clause is almost, if not quite as unintelligible. It provides that "any person who shall have put in for more land to irrigate than his proportion, according to the *pro rata* of water in the ditch or stream from which he is furnished with water, a re-apportionment shall immediately be made as provided in this section." If it means that, in case any person shall propose to irrigate more land than his just proportion, according to the quantity of water in the ditch, there being not enough to irrigate the whole, then that a re-apportionment shall be made, this is a mere repetition of the preceding provision; and we are unable to assign any other meaning to it. But whatever may be the precise powers of the Water Commissioners, deducible from this mass of confusion, we are satisfied it was not intended to confer upon them a mere arbitrary discretion in the apportionment of the water, to be ex-

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exercised, it may be, in utter disregard of the rights of the proprietors. They are merely agents, selected for the public convenience, to regulate the distribution of water according to the rights of the parties in interest. But they are not above the law, and have not the power to distribute the water, according to their whim or caprice, regardless of the rights of those entitled to it; and we are therefore of opinion that their action in distributing to the defendants more than their just proportion of water, does not conclude the plaintiffs from obtaining redress in the Courts.

Judgment and order affirmed. Remittitur forthwith.

Neither Mr. Chief Justice WALLACE nor Mr. Justice RHODES expressed an opinion.

[No. 3,847.]**CECELIA DREYFOUS v. JAMES ADAMS.**

EFFECT OF STIPULATION BY ATTORNEYS.—If counsel stipulate in open Court, that the jury may assess damages in currency if they find for the plaintiff, they are estopped from raising an objection to the verdict on that ground.

NEW TRIAL.—The defendant who applies for a new trial after a verdict assessing damages against him, cannot complain that the Court required the plaintiff to remit a portion of the damages as a condition on which a new trial would be denied.

ACTION to recover a piano and damages for its detention, or the value thereof if a return could not be had. The piano was alleged by the complaint to be worth five hundred and fifty-five dollars, and the damages were laid at one thousand dollars. The attorneys stipulated in open Court that the jury, if they found for the plaintiff, might assess the damages in currency. The jury found for the plaintiff, and assessed the damages at six hundred dollars in currency, as follows: Value of piano four hundred and fifty dollars; damages for use of the same, sixty dollars and seventy-five cents; exemplary damages, eighty-nine dollars and twenty-five cents.

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The defendant moved for a new trial, and the Court decided to grant a new trial, unless the plaintiff would consent to deduct from the verdict the eighty-nine dollars and twenty-five cents exemplary damages, and all of the sixty dollars and seventy-five cents except sixteen dollars and seventy-five cents, the interest on the value of the piano. The plaintiff consented, and the new trial was denied. The defendant appealed.

P. B. Ladd, for the Appellant, argued that the highest value of the piano proven, was four hundred dollars in gold coin, and that the stipulation did not authorize the jury to add to their verdict the difference in a commercial point of view between the value of gold and currency, and that the Court had no authority to disregard the verdict and render a judgment of its own.

T. F. Bachelder, for the Respondent, argued that the jury had a right, under the stipulation, to add to the gold coin value of the piano proven, the difference in value between gold and currency, and that the defendant was not injured by the verdict being reduced in amount by the Court.

By the Court, CROCKETT, J.:

The stipulation of counsel in open Court authorized the jury to assess the damages in currency if they found for the plaintiff, and the defendant is estopped from raising an objection to the verdict on that ground. Nor can he complain of the action of the Court, in requiring the plaintiff to remit a portion of the damages, as a condition on which the defendant's motion for a new trial would be denied. The Court certainly inflicted no injury upon the defendant in requiring the plaintiff to remit a part of the damages. The appeal is frivolous.

Judgment affirmed, with fifteen per cent. damages. Remittitur forthwith.

Points decided.

[No. 1,675.]

JANE A. CLARK v. THOMAS SAWYER, JOSEPH ISAAC, EDMUND PEPPER, JOHN S. MAYER, ELLEN MAYER, MARY SAWYER, JOHN D. PHILLIPS, SOPHIA M. PHILLIPS, RICHARD DOYLE, MATILDA DOYLE, ROBERT J. TOBIN, AND LOUIS ALTSCHUL.

VENDITIONI EXPONAS.—There is a distinction between cases where a *venditioni exponas* is issued for the sale of personal property, and where it is issued for the sale of land. A *venditioni* issued in the former case must go to the officer who made the seizure.

COURT MAY ORDER VENDITIONI EXPONAS TO ISSUE.—When a sheriff, who levies a *fiery facias* on land, goes out of office before having sold, the Court may, by an order, direct his successor to sell the property levied on, and a *venditioni exponas* may be issued to such successor, and he may then sell and execute a deed to the purchaser.

TO WHOM VENDITIONI EXPONAS IS TO ISSUE.—In cases where a sheriff who has received a *fiery facias*, and made a levy on land, goes out of office without having sold, if a *venditioni exponas* is issued for the enforcement of the lien, no reason is perceived why it must necessarily be executed by the retiring sheriff who made the levy, and not by his successor in office.

TRANSFER OF RECORDS FROM COURTS OF FIRST INSTANCE.—When, in 1850, the Records of the Courts of First Instance in California were transferred to the District Court, the latter Court possessed as plenary power over the judgments formerly rendered in the Courts of the First Instance as it had over its own judgments.

AUTHORITY OF COURTS OVER PROCESS.—District Courts have jurisdiction to make all necessary orders respecting process issued, or to be issued, on their judgments.

COLLATERAL ATTACK ON ORDER OF COURT.—When a Court makes an order, and it does not appear on the face of the record that the Court did not have jurisdiction to make it, it will be presumed, in a collateral attack, that the parties were before the Court, and that the proper proceedings were had to authorize the Court to make the order.

RECITALS IN SHERIFF'S DEED.—A Sheriff's deed need not recite the judgment and execution under which he acted. It is sufficient if it appear in the deed that the sale was made under the authority of a judgment and execution; that is, if the deed recites sufficient to show the authority of the Sheriff to sell.

STATUTE REQUIRING RECITALS IN SHERIFF'S DEEDS.—The statute requiring recitals in a Sheriff's deed was not intended to make deeds void which do not contain them, but was only intended to make the recitals evidence of the facts recited; and when such recitals are full, they

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dispense with the necessity of introducing the judgment and execution in evidence.

IDEM.—So far as such statute requires recitals beyond what are necessary to show the authority of the officer to sell, it is merely directory.

RECORDS MUST SHOW ERROR.—If a party objects to the introduction of a deed in evidence because neither the deed nor the notary's certificate appeared ever to have been sealed, and the objection is overruled, he must make it appear by the record, not only that they bore no seal when exhibited, but that they were not sealed when executed; for seals may have been placed on them, but become detached.

ERROR.—He who alleges error must make it clearly appear.

PURCHASER OF LAND WITH CONSTRUCTIVE NOTICE OF PRIOR DEED.—If one who buys without paying a valuable consideration, and with notice of a prior unrecorded deed, given by his grantor to another person, records his deed before the record of such prior deed, and, after the record of such prior deed sells to another, who pays a valuable consideration, and buys without actual notice of the prior deed, such last purchaser has constructive notice of the prior deed, and it will take precedence over his own.

APPEAL from the District Court, Fifteenth Judicial District, City and County of San Francisco.

Ejectment to recover a tract of land at the intersection of Mission and Mary streets, being a part of 100-vara lot, 202. The defendants were severally in possession of separate parcels of the demanded premises. The premises were granted by J. W. Geary, Alcalde of San Francisco, to J. J. Bryant, on the 28th day of November, 1849; and Bryant on the 19th day of November, 1853, conveyed them to Clark, by a deed of bargain and sale, which, on its face, purported a consideration of five thousand dollars. There was no proof of the payment of a consideration. This deed was recorded the same day. Clark, on the 16th day of January, 1855, conveyed an undivided one half of the premises to James George, by a deed acknowledged and recorded January 27, 1855.

February 6, 1855, an ante-nuptial marriage contract between Reuben Clark and Jane A. Kelsey was entered into, by which, in consideration of a marriage about to be solemnized between the parties, Clark conveyed to her an undivided one third of his interest in the premises. This marriage was solemnized the next day. Clark afterwards

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acquired George's interest in the property, and a partition was made between him and his wife.

The defendants' judgments were for the sums of two thousand three hundred and twenty-nine dollars and ninety-five cents, and one thousand seven hundred and eighty-five dollars.

The defendants had judgment in the Court below, and the plaintiff appealed.

The other facts are stated in the opinion.

J. P. Treadwell, for Appellants, argued that the writs should have been executed by the Sheriff of the district, and cited Statute of 1850 (p. 80), section thirty-four; and that the sale was therefore void, and cited *Anthony v. Wessel*, 9 Cal. 103, and *People v. Boring*, 8 Cal. 406. He also argued that the writ of *venditioni exponas* must be considered by the order as directed to be delivered to the old Sheriff, and that such writ did not confer any new power to sell, but merely prompted a Sheriff to do what he had already begun, and cited *Walsh v. Sullivan*, 8 Cal. 165; *Smith v. Morse*, 2 Cal. 556. He further argued that the District Court had no power to take away from the old Sheriff the power to sell, and confer it on the incoming Sheriff. He also argued that the Sheriff's deeds were inoperative, because they did not contain the necessary recitals of the judgments on which the sale was made; and cited *Wiseman v. McNulty*, 25 Cal. 230, and *Donahue v. McNulty*, 24 Cal. 411.

Sol. A. Sharp, for Respondent, argued that the Sheriff did not sell under a writ issued by the Court of First Instance, but under a process issued by the District Court, and that, therefore, section thirty-four of the Act of 1850, did not apply; and cited *Smith v. Morse*, 2 Cal. 256. He also argued that the recitals in the Sheriff's deeds were sufficient; and cited, *Secrist v. Twitty*, 1 McMullan 255; *Wiley v. Robert*, 31 Miss. 212; *Merrit v. Clason*, 12 Johns. 102, s. c. 14 Johns. 484; *Harrison v. Barnes*, 3 Gill. & Johns. 359; *Baptist Church v. Bigelow*, 16 Wend. 28; and *Lee v. Mahoney*, 9 Iowa 344. He also argued that the recital in the

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deed to Clark, of the payment of five thousand dollars, was no evidence of the payment, and that therefore Clark was not a *bona fide* purchaser; and cited, *Colton v. Seavey*, 22 Cal. 496; *Clark v. Troy*, 20 Cal. 218; *Moshier v. Knox College*, 32 Ill. 155, and *Galland v. Jackman*, 26 Cal. 87; and that therefore the Sheriff's deed, having been recorded before Mrs. Clark's purchase, took precedence over her deed.

By the Court, RHODES, J.:

The action was to recover the possession of land in the city of San Francisco. It is admitted that the title of the premises was at one time in one J. J. Bryant, and that the plaintiff had succeeded to that title, unless it had passed to the defendants' grantors by an earlier deraignment.

To establish their title, the defendants put in evidence two judgments in favor of Starkey, Janion & Co. against Bryant, one rendered in March and the other in April, 1850, in the Court of First Instance in the District of San Francisco. They then proved that writs of *feri facias* were issued upon these judgments and placed in the hands of the then Sheriff of the District of San Francisco, and were levied by him upon the premises, before the 15th day of April, 1850, at which time the Court of First Instance was superseded by the organization of the District Court of the Fourth Judicial District. They further proved that the record of the Starkey, Janion & Co. judgments came into the lawful possession of the Fourth District Court before the 19th day of April, 1850, and that on that day, on motion of the attorney of Starkey, Janion & Co., the Court made an order in the following words: "*Starkey, Janion & Co. v. J. J. Bryant*. Now at this day the Court orders the Sheriff to proceed to sell the property levied on under executions previously issued."

In pursuance of this order, two writs, called writs of *venditioni exponas*, were duly issued out of the Court upon the judgments, and placed in the hands of John C. Hayes, who was the newly elected and qualified Sheriff of the county of San Francisco, in obedience to which, he, on the 3d day of May, 1850, sold the premises to the grantors of the de-

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fendants, and in due time gave them Sheriff's deeds therefor. These deeds recited the fact, that by virtue of two writs of *feri facias*, issued out of the (late) Court of First Instance in and for the District of San Francisco, in favor of Starkey, Janion & Co. against J. J. Bryant, directed to the Sheriff of said District, commanding him to make certain moneys in the said writs specified; that officer had made a levy upon the premises; that he had subsequently made return to the District Court of the Fourth Judicial District that he had made such levy and seizure, and that "afterwards by two writs of *venditioni exponas* thereupon issued in the same causes, by special order of the said District Court to the aforesaid Sheriff of the county of San Francisco directed, the said Sheriff was ordered and commanded to expose the said pieces, parcels and lots of land, above mentioned to sale," and after the other usual recitals, as to advertisement, etc., proceeded to convey the premises to the grantees therein "as fully as I, the said John C. Hayes, the Sheriff aforesaid, can, may, or ought to, by virtue of the said writs and orders, and of the law in such case made and provided, grant, bargain, sell," etc.

It does not appear at what time the writs of *feri facias* were returned to the Fourth District Court, nor why they were so returned without a sale of the premises levied on, but it would seem that they must have been returned before the 19th of April, when the order of that date was made.

When the defendants offered their Sheriff's deeds in evidence, they were objected to on the ground; first. That the sales and deeds should have been made by the old Sheriff of the District of San Francisco, and not by the new Sheriff of the county; and that, as made, they were void; second. That they did not recite the date or amount of the judgments, or the date of the writs of *feri facias*, or the date of the writs of *venditioni exponas*; third. That they appeared never to have been sealed by the Sheriff. These objections were overruled, and judgment passed in favor of the defendants, from which, and from an order denying a motion for a new trial, this appeal is taken.

1. The question is not whether the old Sheriff might have

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retained the writs of *feri facias*, and under the authority of the thirty-fourth section of the Act of 1850, to supersede certain Courts, made sales thereunder of the property levied on, nor whether having returned these writs to the proper Court, the writs of *venditioni exponas* might have been issued to and executed by him, but whether they must necessarily have been issued to him, and could be executed by no other officer.

The authorities make a distinction between cases where the *venditioni* is issued for the sale of personal property, and where it is issued for the sale of land. In cases of the former class, the *venditioni* must go to the officer who made the seizure; for by the seizure he acquired a special property in the chattels, and a right to their possession, by virtue of which, it is said, he might sell them without any new command, after the return of the writ, and even after his term of office had expired. (*Tarkinton v. Alexander*, 2 Dev. and Batt. N. C. 87; *Rogers v. Darnoby*, 4 B. Monroe, 238.) In England the *venditioni* goes only for the sale of personal property, and consequently the authorities there are all of this class.

But when an execution is levied on land, the officer making the levy acquires no interest in the land, and is not entitled to its possession. The levy creates a lien only, which may be enforced by a sale, but until sale and deed, the title and right of possession remain in the execution debtor. When a *venditioni exponas* is issued for the enforcement of this lien, no reason is perceived why it must necessarily be executed by the sheriff who made the levy, and who has gone out of office, and not by his successor. It is accordingly held by some of the American authorities that the *venditioni* must be executed by the new sheriff. (*The Bank of Tennessee v. Beatty*, 3 Sneed, 305; *Lesley v. Gardner*, 3 Watts and Serg. 314); and by others, that it may be executed by either the old or new sheriff. (*Holmes v. McIndor*, 20 Wis. 657; *Sumner v. Moore*, 2 McLean, 59; *Tarkinton v. Alexander*, 2 Dev. and Batt. 87.)

After the records were transferred from the Court of First Instance to the District Court, the latter Court pos-

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essed as plenary power over the judgments in favor of Starkey, Janion & Co. against Bryant, and the process issued or to be issued thereon, as it could have exercised, had those judgments been rendered in that Court. It is asserted by the plaintiff that the District Court had competent authority to direct and control the Sheriff of the district in the execution of the *fi. fas.* which had been delivered to him, and it is equally clear, we think, that the Court possessed competent jurisdiction to make all necessary and proper orders in respect to process issued or to be issued upon those judgments. Had the Sheriff of the district, while the *fi. fas.* were in his hands, died or left the State, or become for any reason incompetent to act, can there be any doubt that the Court might, by order, have made other provision for the execution of those or other proper writs? If the parties agreed that the writs should be executed by another officer than the Sheriff of the district, or that other writs should be issued upon the judgment, and that they should be executed by the Sheriff of the county, we see no reason to question the validity of an order to that effect made by the District Court. Upon a proper showing that Court had jurisdiction to order such writs to issue as might be necessary for the execution of those judgments, and to direct the Sheriff of the county to execute them. The order of the Court, in evidence in this case, may have been irregular or in some respects erroneous, but as it does not appear upon the face of the record that the Court did not have jurisdiction to make the order, it will be presumed in a collateral attack like the present, that the parties were before the Court, and that the proper proceedings were had to authorize the Court to make the order.

We are of the opinion that the writs in this case were properly executed by the new Sheriff, and that the sale and deeds thereunder were effectual to pass the title, unless they may be impeached for some other reason.

2. It is insisted by counsel for the plaintiff, that the Sheriff's deeds were not made in conformity to the requirements of section two hundred and seven of the Act of April

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22, 1850, to regulate proceedings in civil cases, and that the Court erred in admitting them in evidence. That section reads as follows: "The officer who shall sell any real estate, or lease of lands and tenements, for more than one year, shall make to the purchaser a deed, to be paid for by the purchaser, reciting the names of the parties to the execution, the date when issued, the date of the judgment, order or decree, and other particulars as recited in the execution; also a description of the property, the time, place and manner of sale, which recital shall be received as evidence of the facts therein recited." The general rule is that a sheriff's deed need not recite the judgment and execution. It is sufficient if it appear that they were the authority under which he acted. (*Blood v. Light*, 38 Cal. 649; *Averill v. Wilson*, 4 Barb. 280; *Jackson v. Jones*, 9 Cow. 182.) When title is to be established through a Sheriff's deed, the judgment and execution must be introduced in evidence with the deed. This statute makes the recitals evidence of the facts recited, and when the recitals are full, dispenses with the necessity of introducing the judgment and execution. This, we think, was its only purpose and effect. It could not have been intended to make void all deeds from which were omitted some of the recitals named. Precisely the same question, under a statute which differs from the one invoked here only in two unimportant words, was presented to the Supreme Court of Arkansas in *Jordan v. Bradshaw*, and again in *Bettison v. Budd*, 17 Ark. 106 and 546, and it was held that a Sheriff's deed, which failed to recite the judgment, was admissible in evidence, upon proof of the judgment and execution *aliunde*.

In the last named case, the Court said: "The statute requires that the deed shall recite the names of the parties to the execution, the date when issued, the date of the judgment, order, or decree, and other particulars recited in the execution; also, a description of the time, place, and manner of sale, and further declares that such recitals shall be received in evidence of the facts therein contained. The obvious intention of this statute was to save the purchaser from the necessity of exhibiting the judgment and

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execution upon the trial, in cases where his rights under such judgment and execution might be called in question, and also to serve as a matter of convenience, as well to the Sheriff as to the purchaser, as it would point the former to his authority to sell if he was called on to answer, and would facilitate the latter in deriving his title. The recitals of the deed in this case fall short of the statute, yet it was competent evidence in connection with the judgment and execution, since it recited sufficient to show the authority of the officer to sell." The Court then quotes the following language from the *Lessor of Perkins v. Duffle* (10 Ohio, 437): "The law regulating judgments and executions requires that the deed of conveyance, to be made by the Sheriff or other officer, shall recite the execution, or the substance thereof, and the names of the parties, the kind of action, the amount and date of the term of rendition of each judgment, by virtue whereof said lands and tenements were sold," etc. The deed in the present case recites the execution, the names of the parties, as therein stated, but in reference to the judgment does not again recite their names—neither does it state the amount of the judgment, except as it appears upon the execution. It recites sufficient to show that the officer had authority to sell; and this we hold to be all that is necessary—although in every instance it would be well for a Sheriff or other officer to follow literally the provisions of the statute. So far as the statute makes provision for any recitals, beyond what is necessary to show an authority to sell, we consider it as directory merely.

8. The case shows that when the deeds were produced in evidence — more than sixteen years after they were made — they bore no seals, but it fails to show whether they were, or were not, in fact sealed, at the time they were made. They purported to have been sealed, for they closed with the words: "In witness whereof, I, the said John C. Hayes, Sheriff, have hereunto set my hand and seal," etc., and were "signed, sealed and delivered in the presence of" a subscribing witness. The objection was that they "appeared never to have been sealed by the said Hayes." This objection was overruled, and, so far as we can know from the

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record, properly. Upon inspection, it may have appeared to the Court that the deeds were sealed, and that the seals had become detached.

The further objection to two of the deeds that the certificates of acknowledgment which purported to have been made by a Notary Public, "do not appear to bear his official or other seal," may be answered in the same way. Though they bore no official or other seal when exhibited in evidence, it may have been clear that they were properly sealed when made. The objection is met by the rule that he who alleges error, must make it clearly to appear.

4. The point is made that the plaintiff is entitled to recover a portion of the demanded premises, upon the ground that, being a purchaser in good faith, and for a valuable consideration, the conveyance to her will prevail, under the Registry Act, over the prior conveyance by the Sheriff. The point is made upon the following facts: Two of the Sheriff's deeds were not recorded until the 22d of November, 1853. On the 19th day of the same month, J. J. Bryant, for the expressed consideration of five thousand dollars, conveyed to one Reuben Clark, who afterwards became the husband of the plaintiff, the whole of the demanded premises, and his deed was duly recorded on the same day. It does not appear, however, that Clark took his deed without notice of the unrecorded Sheriff's deeds, or that he paid any valuable consideration for it. In April, 1855, after the plaintiff had become the wife of Clark, and in fulfillment of an ante-nuptial contract so to do, and in consideration thereof, Clark conveyed to the plaintiff the premises in controversy, and her deed was acknowledged and in due time placed of record. The plaintiff, being a witness in her own behalf, testified that she had never heard of any adverse claim to the land in controversy, until after the delivery to her, and the recording of her deed. Upon these facts it is claimed that, because the deed to Clark was recorded before the Sheriff's deeds, the record of the latter did not impart notice of their contents to purchasers from Clark, and that, if he was not a purchaser in good faith, and for a valuable consideration, still that his

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grantee, who took without notice and for a valuable consideration, would take a good title. In *Mahoney v. Middleton*, 41 Cal. 41, the same question was presented, and the ruling was adverse to the views now urged by the appellant. We see no reason for changing the ruling here. The other points do not require special notice.

In our opinion the judgment and order should be affirmed, and it is so ordered.

Mr. Justice CROCKETT, being disqualified, took no part in the decision.

[No. 3,468.]

THE PEOPLE OF THE STATE OF CALIFORNIA v.
EUREKA LAKE AND YUBA CANAL COMPANY
CONSOLIDATED, AND CERTAIN REAL ESTATE,
CONSISTING OF WATER DITCHES, SAWMILL AND MINING
CLAIMS.

SIGNING RECORDS OF A CORPORATE BOARD.—The general rule, that every public document which is required by law to be executed by a public officer must be verified by his official signature, does not extend to the proof of the records of a corporate board which exercises powers municipal and *quasi* legislative.

IDEM.—The Chairman and Clerk of the Corporate Board, exercising powers municipal and *quasi* legislative, sign the record of its proceedings, not as certifying to their own official action, but as witnesses that the record is the record made up by the Clerk, under the direction of the Board.

SIGNING RECORDS OF A BOARD OF SUPERVISORS.—The statute requiring the Chairman and Clerk of a Board of Supervisors to sign the record of its proceedings, does not invalidate such record as proof of the action of the Board if the Clerk and Chairman fail to sign, but has the effect merely of putting the party who desires to prove the official action of the Board to some additional trouble in establishing the handwriting of the entries, their cotemporaneous character, and the official custody from which the book was produced.

IDEM.—The effect of the statute requiring the Clerk and Chairman of the Board of Supervisors to sign the record of its proceedings, is merely to make their signatures evidence identifying the minutes.

SIGNING RECORD OF LEVY OF A TAX.—A tax is not void, because the record of the Board of Supervisors in levying it is not signed by the Chairman and Clerk of the Board.

Argument for Appellant.

RETURN OF ASSESSMENT ROLL BY ASSESSOR.—The statute requiring the Assessor to return the assessment roll to the Clerk, prior to the first Monday in August, is directory merely; and the failure of the Assessor to return it before that time, is a matter of which the taxpayer cannot complain.

CERTIFYING TO ASSESSMENT ROLL BY ASSESSOR.—The Assessor may certify to the assessment roll after it has been returned to the Clerk, and after the first Monday in August, for he does not lose control of the assessment roll until it has been both certified and returned to the Clerk.

ACTION to recover from the defendant three thousand nine hundred and eighty-seven dollars, being the State and County Tax levied for the fiscal year 1871, and special school taxes in several school districts in the County of Nevada, in which the property of the defendant was situated. The real estate was fully described in the complaint, and the Court was asked to enforce a lien on it for the tax. The answer, among other defenses, denied the levy of a tax, and set up, that if the Board of Supervisors ever attempted to levy a tax, no record of the levy was made up and signed by the Chairman and Clerk, and that no assessment roll was certified or authenticated by the Assessor.

The Board of Supervisors levied the tax at the time, and in the manner required by the statute, but neither the Chairman of the Board, nor its Clerk, signed the minutes of the Board making such levy. The Court below rendered judgment for the plaintiff, and the defendants appealed.

The other facts are stated in the opinion.

Niles Searls, for the Appellant, argued that, as the statute (2 Hittel, paragraph 6,975), requires the Chairman and Clerk of the Board of Supervisors to sign the record of its proceedings, that the levy of the tax was void, and cited, *Spear v. Ditty*, 9 Vermont, 282; Blackwell on Tax, Titles 345-6 and 7; and *The People v. McCreery*, 34 Cal. 432.

He also argued that the Assessor having returned the assessment roll to the Clerk without his certificate, the assessment was void, and cited, 2 Hittel, paragraph 6,170; and *People v. S. F. Savings Union*, 31 Cal. 132; Blackwell on Tax, Titles 106; *Sibley v. Smith*, 2 Gibbs (Mich. R.) 498; and *Colly v. Russell*, 3 Greenleaf, 227.

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M. S. Deal and *J. I. Caldwell*, for the Respondent, argued that the statute requiring the Assessor to return and certify his roll before the first Monday in August was merely directory, and cited, *State of Nevada v. Western Union Telegraph Company*, 4 Nevada, 338; and that the same rule applied to the statute requiring the Chairman and Clerk to sign the records of the Board of Supervisors; and cited, *Hill v. Wolf*, 28 Iowa, 577; *Hart v. Plum*, 14 Cal. 148; and *Rex v. Lordale*, 1 Burr, 455.

By the Court, MCKINSTRY, J.:

The sixth section of the "Act to create a Board of Supervisors," etc., (Hittell Gen. L. 6,975) provided: "The Clerk shall keep a full and correct record of all the proceedings of the Board, etc. The record of proceedings shall be signed by the Chairman of the Board and Clerk."

It is objected that the record of the action of the Board, in levying the tax complained of, was not signed by the Chairman or Clerk.

The general rule is well settled that every public document which is required by law to be executed by a public officer, must be verified by the official signature of the person who made it. The rule applies to the execution of all public authorities, where the exercise of the power affects the property of the citizen. The power is reposed in the officer, not in the man; and but for the protection of the law, he would be a trespasser. When he attempts to exercise the power, he must recognize the source from whence he derives it, and perform all acts in the character alone which the law recognizes. (Blackw. Tax Titles, 345-6.)

But the reason of the rule does not extend to the proof of the records of a corporate board which exercises powers municipal, and *quasi* legislative. The action recorded is not the action of the Chairman or Clerk; they sign the minutes not as certifying to their own official action, but as witnesses that the record is the record made by the Clerk under the direction of the Board. To give more effect to their signatures, would be to decide that in the absence of any

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provision of the statute requiring the Chairman and Clerk to sign the minutes, and by reason of a common law principle, the minutes could not be introduced in evidence. But the records of the proceedings (when the law does not specially require them to be signed) have always been admitted in evidence, after certain preliminary proof. The statute does not declare that the record shall not be proof of the action of the Board if not signed by the officers named, but the effect is only to make their signatures evidence, identifying the minutes. The failure of the Chairman and Clerk to discharge the particular duty, simply imposed on the party desiring to prove the official action of the Board, some additional trouble, in establishing the handwriting of the entries, their contemporaneous character, and the official custody from which the book was produced.

The third finding of the District Court is: "The Assessor returned his assessment roll to the Clerk of the Board of Supervisors on or before the first Monday in August, but did not attach his certificate thereto until the 18th of September, when he certified to said roll."

If the failure to certify rendered void the action of the officer, it was because the certificate was not made on or before the first Monday in August, not because he delivered the roll to the Clerk before certifying to it. If the roll was certified and delivered on or before the first Monday in August, it could make no difference that the manual delivery preceded the attaching of the certificate. The Assessor did not lose the control of the roll until it was both certified and delivered.

What was the effect of his failure to certify and deliver the assessment roll until the 18th of September? The revenue law (Sec. 42) declares that the Acts therein required between the assessment and commencement of suit shall be deemed directory, merely. And independent of this, the provisions of the statute requiring the Assessor to return his roll to the Clerk prior to a certain date would be construed to be merely directory. (*Hart v. Plum*, 14 Cal. 148.) The time prescribed is for the convenience of other officers, who have their duties to perform. It is not a matter of

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which the taxpayer can complain; it does not injure him. (*The State v. the W. U. T. Co.* 4 Nevada, 344.)

Judgment affirmed. Remittitur forthwith.

Neither Mr. Chief Justice WALLACE nor Mr. Justice NILES expressed an opinion.

[No. 3,785.]

A. LANGENBERGER, L. BLOCHMAN, J. CERF AND
B. DREYFUS v. H. KREGER.

ALTERATION IN A DRAFT.—If a person who has no authority to do so, and who is not the agent for the payee for that purpose, writes across the face of a draft, payable generally in money, the words “payable in United States gold coin,” it is not such an alteration of the draft as vitiates it.

DRAFT PAYABLE IN CURRENCY.—A draft which does not specify the particular kind of money in which it is payable may be paid in legal tender notes.

EVIDENCE OF KIND OF MONEY DRAFT IS PAYABLE IN.—If a draft does not specify the kind of money in which it is payable, evidence cannot be introduced that it was understood and agreed that it should be paid in either gold or silver, nor can a mercantile usage make it payable in gold or silver.

DEMAND OF PAYMENT OF DRAFT.—If a draft does not specify the kind of money in which it is made payable, a demand of payment in gold coin, whether by a notary or the holder, is not sufficient to charge the drawer.

IDEM.—In the absence of evidence to the contrary, the presumption is that a notary demands payment of a draft in the currency in which it appears on its face to be made payable.

IDEM.—A demand on the drawee of the payment of a draft does not charge the drawer, if the demand is not in accordance with the tenor of the draft.

APPEAL from the District Court, Seventeenth Judicial District, County of Los Angeles.

The following is a copy of the draft sued on:

“\$622 00. Mr. Leopold Kahn, No. 821, Mission street,
“San Francisco: Please pay to Mr. Langenberger, Bloch-
“man & Co., or order, the sum of six hundred and twenty-

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“two dollars, on March 15th, 1872, without grace, and
“charge the same to account of

“A. KROEGER.

“Anaheim, Feb’y 23d, 1872.”

The plaintiffs were doing business under the firm name of Langenberger, Blochman & Co. The defendant had funds in silver in the hands of the drawee sufficient to meet the draft, but had no gold or currency.

The Court below held that the words in red ink across the face of the draft made a material alteration in the draft, and that the plaintiff was not entitled to recover.

The other facts are stated in the opinion.

Glassell, Chapman & Smith, for the Appellants, argued that the words written across the face of the draft, were not a part of it, and were not an alteration in it, and cited *Carr v. Welch*, 46 Ill. 89.

V. E. Howard, for Respondent, argued that, as it appeared that the plaintiffs authorized a demand of payment in gold coin, it was to be presumed that they authorized the alteration, and that the alteration was material, and cited Story on P. Notes, (Sec. 408,) and the Civil Code, (Sec. 1700,) and that the custom to pay in gold could not control the law.

By the Court, CROCKETT, J.:

The defendant, residing at Anaheim, made and delivered to one Smith, for the plaintiffs, a draft on Leopold Kahn, of San Francisco, for six hundred and twenty-two dollars, payable to the order of the plaintiffs, but specified no particular kind of money in which it was to be paid. On receiving the draft, Smith, without the authority of the defendant, and so far as the evidence shows, without the knowledge or authority of the plaintiffs, wrote across the face of it in red ink, the words “payable in United States gold coin.” The Court finds, that on receiving the draft at San Francisco, the plaintiffs presented it to Kahn, and demanded payment in gold coin, which he refused; but ten-

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dered payment in silver coin, which the plaintiffs declined to accept. Thereupon the draft was delivered to a notary, who presented it to Kahn for payment, which was refused, and the draft was protested, of which the defendant was duly notified. There is nothing to show that payment was tendered to the notary in silver or currency, nor any direct evidence that he demanded payment in gold. All the direct evidence in respect to the demand and protest by the notary, is contained in his official certificate, in which he states that he demanded payment, and that it was refused.

The action is to recover the amount of the draft, and a judgment having been entered for the defendant, the plaintiffs appeal.

There was no evidence as to the nature or extent of Smith's agency for the plaintiffs; nor any tending to prove that when they presented the draft for payment and demanded gold, they had any notice or information that the words across the face of the draft were written without the authority of the drawer. In the absence of all proof on the point, it cannot be inferred that Smith was acting within the scope of his agency, in writing these words across the draft; and the plaintiffs are not bound by or responsible for his unauthorized act, unless they subsequently adopted and ratified it, with a knowledge of all the facts; and there was no proof of such ratification. It was, therefore, the unauthorized act of a stranger, having no interest in the transaction, and did not vitiate the draft. But in order to hold the drawer, it was incumbent on the plaintiffs to make a proper demand of payment, and to give due notice of non-payment. As the draft specified no particular kind of money in which it was payable, it might have been paid in legal tender notes; and it was not competent for either of the parties to prove by parol, that it was understood and agreed that it should be paid either in gold or silver. To admit such evidence, would be to contradict or vary the written instrument; and proof of a mercantile usage cannot supercede a positive rule of law. The drawee was, therefore, at liberty to pay the draft in legal tender notes; and if the plaintiffs demanded payment in gold only, this was not

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a sufficient demand. They were authorized to demand payment according to the tenor of the draft and not otherwise; and if the demand was limited to gold coin, it was not sufficient to hold the drawer. It is said, however, that it appears from the certificate of the Notary that he demanded payment generally; and that the presumption is he performed his duty, and demanded payment according to the tenor of the draft, disregarding the words "payable in United States gold coin," written across the face of it. The finding on this point is not very satisfactory, and is to the effect that the draft was duly presented by the Notary, and payment was demanded and refused, and notice duly given; and then the Court adds, but there is no evidence that he notified the payee (meaning doubtless the drawee) to disregard the words "payable in United States gold coin," or that he did not demand gold coin. In effect, this is a finding that in the opinion of the Court, the demand by the Notary was for gold coin, a conclusion which, we think, was justified by the evidence. The plaintiffs demanded payment in gold, and now assert in their complaint that such was the understanding of the parties; and when payment in that currency was refused, they placed the draft in the hands of the Notary, without instructions, so far as the proof shows, in respect to the nature of the demand he was to make. Finding the words "payable in United States gold coin" written across the face of the draft, he doubtless concluded, (and very naturally), that they were placed there by the authority of the drawer. The plaintiffs believing they were entitled to demand gold, had declined to accept payment in silver, and it is altogether improbable that they would have received legal tender notes, which were still less valuable. Under these circumstances, there is a strong presumption that the Notary was instructed to demand gold. But if he had no instructions except to demand payment, it could not reasonably be inferred that he disregarded the words written across the face of the draft. In the absence of evidence to the contrary, the presumption is he demanded payment according to the face of the draft, which was apparently payable in

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gold coin. A demand of this character by the Notary was not more effectual to charge the drawer than a similar demand by the plaintiff. The vice of the demand is that it is not in accordance with the tenor of the draft, as drawn by the maker; and in the absence of a proper demand, there is nothing to charge the drawer.

Judgment and order affirmed.

Mr. Justice RHODES did not express an opinion.

[No. 4,268.]

FOSCALINA v. DOYLE.

DISMISSAL OF APPEAL.— A motion to dismiss an appeal because it is frivolous, and intended to delay the execution of the judgment, made intermediate the taking of the appeal and the filing of the transcript, will not be entertained.

IDEM.— On the hearing of such motion the Court will not look into the transcript, if produced in support of the motion, for the purpose of ascertaining the merits of the appeal.

APPEAL from the District Court of the Third Judicial District, Alameda County.

The facts are stated in the opinion.

Crane, for the motion.

By the Court, WALLACE, C. J.:

The appeal is taken by the defendant from an order refusing to stay the issuance of a writ of *habere facias* upon the judgment recovered by the plaintiff in the District Court for the County of Alameda, and lately affirmed here. The appeal was perfected only on the 21st of March last, and the time allowed to the appellant to file the printed transcript of the record, under the second rule of practice, has not elapsed. The respondent produces a copy of the record, and thereupon moves that the appeal be dismissed,

Points decided.

because it is frivolous and taken with intent to delay the execution of the judgment. We cannot, however, look into the copy of the record produced by the respondent for the purpose of determining in advance what, if any, merit the appeal may have. The rule of the Court already referred to is intended to operate uniformly upon all appeals taken to this Court, and a motion of this character, made intermediate the taking of the appeal and the filing of the transcript, will not be entertained. But even if we could look into the record to determine the merits of the appeal and should ascertain that it had been taken merely for purposes of vexation and delay, still we ought not to dismiss the appeal, if well taken in point of procedure. The remedy would be found only in an affirmance of the order, and the imposition of damages in a proper case.

To depart from these rules would produce great confusion in practice, and consequent delay in the orderly disposition of causes. Besides, it is difficult to see how the respondent here can be prejudiced by postponing the consideration of the merits of this appeal until such time as it shall come regularly before us for determination. The appeal is from an order refusing to stay the writ, to which the plaintiff is otherwise entitled upon the judgment he obtained. The order of the Court below from which this appeal is taken was, therefore, of a negative character.

It is clear enough that an appeal from such an order, in whatever form such appeal be taken, could not *per se* affect the right of the plaintiff to final process upon the judgment he has obtained.

The motion to dismiss the appeal must be denied, and it is so ordered.

[No. 3,455.]

JAMES HUTCHINGS AND JOHN HUTCHINGS v.
GEORGE H. CASTLE.

COMPLAINT IN TROVER.—Under our practice, in an action for taking and carrying away goods, an allegation in the complaint, that the defendant

Statement of Facts.

took and carried away the goods, is equivalent to an averment that the defendant converted the goods to his own use.

JUDGMENT IN TROVER.—If, in an action of trover, the complaint, in addition to alleging a taking and carrying away of the goods, avers a detention of the same, and it appears on the trial that the defendant had sold the goods before the suit was brought, and the plaintiff recovers judgment only for the value of the goods, the defendant is not injured by the allegation of a detention.

EVIDENCE ON A DEFECTIVE ANSWER MUST BE OBJECTED TO.—If, in an action against a Sheriff for damages for taking goods, by virtue of an attachment, from a vendor of the defendant in the attachment suit, the Sheriff relies on fraud in the sale, but in his answer does not distinctly aver the facts constituting the fraud, and the answer is not demurred to, nor is evidence of the fraud objected to on the trial, a judgment for the plaintiff will not be disturbed, for it is too late to raise an objection to the evidence for the first time in the Supreme Court.

JUDGMENT NOT REVERSED FOR ERROR WHICH DOES NO HARM.—When the Court fails to find on a material issue, and the findings are excepted to for that reason, the judgment will not be reversed if the finding must have been adverse to the appellant.

DECLARATIONS OF VENDOR AS EVIDENCE.—The declarations of a vendor, made after a sale and delivery of personal property, are not admissible in evidence to show fraud in the sale.

COURT MAY DISREGARD ILLEGAL EVIDENCE RECEIVED.—If illegal evidence is admitted on the trial, the Court does not err in refusing to find a fact proved by such evidence.

DECLARATIONS OF AGENT AS EVIDENCE.—The declarations of an agent of a vendee whose agency is limited to the care and custody of goods after they have passed to the possession of the vendee, are not admissible in evidence to show that the purchase by the vendee was fraudulent.

APPEAL from the District Court, Fifth Judicial District, County of San Joaquin.

On the 12th day of August 1871, M. Bovard and Thomas Hutchings, partners under the name of Bovard & Hutchings, sold and delivered to the plaintiffs a quantity of goods, wares and merchandize, of the value of five hundred and eleven dollars and twenty-five cents, in satisfaction of an indebtedness of Bovard & Hutchings to the plaintiffs. At the time of the sale, Bovard & Hutchings owed M. M. Soria six hundred and eighty dollars; and on the 25th of August, 1871, Soria sued them, procured an attachment, which was placed in the hands of the Sheriff (the defendant here) who, by virtue of the attachment, levied on and took into his possession the goods, and, on the 19th of November following,

Argument for Appellant.

sold them on an execution issued on a judgment obtained in the action. On the 11th of January, 1872, this action was commenced against the Sheriff to recover the damages, alleged in the complaint to be nine hundred dollars.

At the time of the sale of the goods, they were taken across the road from the store of Bovard & Hutchings to another building, and placed in the cellar in charge of one Atkinson, as the agent of the plaintiffs. Soria was called as a witness for the defendant, and testified that on the 25th of August he went with the Under Sheriff, R. W. Stevenson, to the place where the goods were, and Atkinson told him the goods were in the cellar, and that they belonged to Bovard & Hutchings, and they had removed them from the old building across the way into the cellar, until the building where they were was ready for shelving, and that they were collecting their accounts, and had shut up and moved the goods across the road, for the purpose of opening in the new store.

This was the testimony which the Court speaks of as not having been objected to.

The defendant objected to the findings, for want of a finding as to whether the sale was made to hinder, delay and defraud creditors, but the Court refused to find on that point.

The plaintiff recovered judgment in the Court below, and the defendant appealed.

The other facts are stated in the opinion.

B. & J. H. McKinne, for the Appellant, argued that, as the defendant did not detain the goods at the time of the commencement of the action, as alleged in the complaint, and as there was no allegation in the complaint of a conversion, there was a variance between the complaint, the proofs and the findings, and that the cause of action in the complaint was neither trover nor trespass, but detinue, and cited *Lucas v. City of San Francisco*, 28 Cal. 591. They also argued that there should have been a finding on the question of fraud, and cited *Miller v. Steen*, 30 Cal. 402, and *Cowing v. Rogers*, 34 Cal. 652. They also argued that

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the evidence was insufficient to support the findings, because the plaintiffs were bound by the declarations of their agent, Atkinson, and cited Greenleaf on Evidence (12 Ed. Sec. 113).

Budd & Scaniker and *W. S. Buckley*, for the Respondent, argued that the Court correctly refused to find on the question of fraud, because there was no allegation in the answer of fraud, and cited *Semple v. Hagar*, 27 Cal. 166, and *Kinder v. Macy*, 7 Cal. 206; and that Atkinson was not the general agent of the plaintiffs, and his testimony was improperly admitted, and that the plaintiffs were not bound by his declarations.

By the Court, MCKINSTRY, J.:

This action was brought against the sheriff, to recover damages for the unlawful taking from the possession of the plaintiffs, and carrying away, of certain personal property, and for the detention of the same. The property was sold by the defendant before the commencement of this action; and the appellant—the defendant—makes the point that the property was not “detained” when the suit was brought, and that the complaint is not sufficient in trover, because there is no averment of a conversion. But trover lay where *trespass de bonis* lay; and an unlawful taking, if followed by the carrying away, was of itself a conversion. (Chitty’s Pleadings, 154.) Under our system a statement of the facts, that defendant took and carried away, is equivalent to the averment, “converted to his own use,” etc.

The allegation in the complaint, as to the detention, did not affect the judgment. The District Court found the value of the goods at the time they were taken, but allowed no damages for the detention, by way of interest or otherwise.

The answer is perhaps obnoxious to the criticism of counsel, that it neither states the facts constituting fraud, nor distinctly avers that the parties were guilty of actual fraud, independent of fraud conclusively presumed from the want of delivery and change of possession. But the plead-

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ing was not demurred to, nor did the plaintiffs object to the evidence tending to prove the fraud, when it was offered, on the ground that it was inadmissible under the averments of the answer. There was a question addressed to the Court, which intimated an objection, and some conversation on the subject (which is carefully preserved in the transcript), but no specific objection. It is too late to make it in this Court for the first time.

I am inclined to think the Court below should have found upon the issue: Was the sale made with intent to hinder, delay or defraud the creditor? But I do not think the omission to find on that question is a reason for reversing the judgment, because the finding must have been adverse to the defendant.

The Court did find an immediate delivery and actual and continuous change of possession. Aside from the testimony bearing on the question of delivery and change of possession, fraudulent intent was attempted to be proved by the declarations of one the vendors of plaintiffs, made after the sale and delivery (which were clearly inadmissible), and by those of one Atkinson, an agent of the plaintiffs. The declarations of Atkinson were admitted because the plaintiffs had testified to his agency. But, if their agent, his agency was limited to the bare custody of the goods after they passed to the possession of the plaintiffs. His opinion as to the rights of the parties—disconnected from the things done within the scope of his agency—was not evidence.

There was, therefore, no legal evidence sufficient to justify a finding that the sale was made to hinder, delay or defraud the creditor; and the omission to find that it was not made with such intent could not have prejudiced the defendant.

Judgment and order denying new trial affirmed.

Opinion of the Court — Wallace, C. J.

[No. 4,288.]

FAXON D. ATHERTON v. THE BOARD OF SUPERVISORS OF SAN MATEO COUNTY.

ELECTION FOR REMOVAL OF COUNTY SEAT.—When an election is held for the removal of a County Seat, under Chapter II, Title I, Part IV, of the Political Code, and a majority of the electors vote in favor of retaining the County Seat where it is, the Board of Supervisors may, at any time, upon the presentation of a proper petition, order a second election for the same purpose. The statute does not restrict the number of elections which may be held, so long as the place of the County Seat is not changed.

GRANTING A REHEARING.—If, upon the argument of a cause in which the proceedings of a Board of Supervisors are sought to be reversed by *certiorari*, any issue of fact is waived, and the question presented is one of law, the counsel cannot, after a decision on the point of law, have a rehearing on the ground that there is a question of fact which should be determined.

CERTIORARI to the Board of Supervisors of San Mateo County, to review certain proceedings of the Board, the nature of which is stated in the opinion.

Campbell, Fox & Campbell, for Petitioner.

W. H. L. Barnes, for Respondent.

By the Court, WALLACE, C. J.:

It appears by the petition for the writ of *certiorari*, and the return to the writ, that, in the year 1873, an election was held (under the provisions of the Political Code concerning the removal of county seats by popular elections to be held for that purpose,) but that, at such election, Redwood City, the place at which the county seat of San Mateo County was then already fixed by law, obtained a majority of all the votes cast, and thereupon the Board of Supervisors gave public notice of the fact as required by law. It further appears that in the present month of May another popular election for the same purpose as the first had been ordered by the Board, to be holden in the month of June next, and that the order was made upon the presentation

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to the Board of a petition signed by qualified electors of the county of San Mateo, equal in number to one third of all the votes cast in the county at the last general election. It is now claimed by the petitioner, that, in making this order the Board exceeded its jurisdiction, and that its proceedings in that behalf should be annulled.

The Political Code, (Sec. 3,976 *et seq.*) provides that whenever the inhabitants of any county of the State desire to remove the county seat of the county from the place where it is fixed by law, they may present a petition to the Board of Supervisors of the county, praying such removal, and that an election be held to determine to what place such removal be made.

If the petition so presented be signed by qualified electors of the county equal in number to at least one third of all the votes cast in the county at the last preceding general election, it is made the duty of the Board to order that the election be held. Other provisions of the statute direct in detail the mode in which the election is to be conducted, and provide that when its result has been ascertained by the Board, if it appear that a majority of all the votes cast are in favor of any particular place, the Board must give public notice of the result, in which notice they shall designate the place so selected to be the county seat, and must declare it to be such from and after a day to be specified in the notice; and it is further provided that from and after the day named in the notice, the place therein designated shall be the county seat of the county.

It is to be observed that the provision is, whenever the inhabitants desire a removal of the county seat, a petition of the prescribed character may be presented, and the required order for the election be made.

This language, considered by itself, would import that the right of the electors to petition the Board, and the corresponding duty of the Board to direct an election upon the presentation of a proper petition, are not exhausted or at all affected by the mere fact of an election already theretofore held for the same purpose. But it is provided by the statute (Sec. 3,984) that if at an election already held, a

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majority of the votes were cast for some other place than that fixed by law as the former county seat, no second election for the removal thereof must be held within two years thereafter, and (Sec. 3,985) that two elections to effect such removal shall not be held within any three years.

These seem to be the only limits set by the statute to the right it confers upon the electors to petition for, and the duty it imposes upon the Board to order an election to remove a county seat.

It is clear that the election held in the county of San Mateo, in 1873, did not effect a removal of the county seat of that county, because a majority of all the votes cast at that election were not "cast for some other place than that fixed by law as the former county seat," but, on the contrary, the majority was cast for Redwood City, which was at the time already the county seat of the county fixed by law.

It is argued, however, by the counsel for the petitioners that the fact that a majority of the votes cast at the election were in favor of Redwood City, operated in itself a removal within the intent of the statute, so as to inhibit the holding of any other election to remove the county seat within two years thereafter.

It is urged that though the mere locality of the county seat remained unaltered by that election, yet the tenure by which, and the authority upon which the county seat was maintained at Redwood City after the election, was a new tenure, and on authority different from that upon which it had been theretofore held there. But we think that this position, however ingenious, cannot be maintained as a sound construction of the statute, or a correct exposition of its meaning. We think that the removal of the county seat mentioned in the statute means that change of the locality of the county seat which is only to follow when "a majority of the votes are cast for some other place than that fixed by law as the former county seat."

It is urged by counsel that this construction of the statute, if indulged, will leave no check upon the power of a factious minority to agitate continuously, and without cessation, the question of removal of the county seat of any

Points decided.

county, by means of frequent petitions presented for that purpose, and so force the majority into compliance with its views, in order to avoid the expense notoriously attending the frequent holding of elections for the removal of the county seat.

Whether the statute in this respect be ill or well founded in point of mere policy, is a matter, however, with which we cannot concern ourselves here. It is our duty to enforce it as we find it plainly expressed on the statute book, unless, indeed, it appear to be obnoxious to objections of a constitutional character; and none such have been suggested here.

The writ must therefore be dismissed, and it is so ordered.

Mr. Justice RHODES did not express an opinion.

By the COURT, on petition for rehearing.

Upon the argument of the cause the question presented by counsel was understood to be one of law alone — any possible issue of fact being expressly waived — and the decision of the Court was of course confined to the mere question of law involved. It is too late now to suggest upon petition for rehearing, that, after all, there are questions of fact which the petitioner desires to have determined, and upon which he might have relied, had he chosen to do so.

Rehearing denied.

[No. 3,755.]

G. N. PENNYBECKER v. JAMES McDUGAL AND
DANIEL McDUGAL.

WHEN A BUILDING IS PERSONAL PROPERTY.—A building set upon blocks resting on the ground is personal property, and replevin lies to recover it.

WHEN A FENCE IS PERSONAL PROPERTY.—A portable fence made of posts and boards, and resting on the surface, is personal property.

Argument for Appellants.

POWER OF STATE OVER UNITED STATES LANDS.—The Legislature of this State cannot authorize parties who have placed improvements, which have become a part of the realty, on public lands of the United States, to remove the same after the lands have become private property.

BUILDINGS AND FENCES ON PUBLIC LANDS.—If buildings and fences, which are erected on public lands of the United States, are not attached to the soil, and are not a part of the realty, the United States has no interest in them, and they do not pass to a purchaser from the United States, and the person who constructed them has a right to remove them after a patent has issued to the purchaser.

JURISDICTION OF DISTRICT COURT.—If the complaint avers the value of the property in controversy to be more than three hundred dollars, the District Court has jurisdiction, though the judgment recovered is for less than three hundred dollars.

DAMAGES IN REPLEVIN.—In an action of replevin for the materials which, before their removal, composed a fence attached to and a part of the realty, the plaintiff can recover only the value of the materials after their removal, and not the value of the fence as it stood before the removal.

APPEAL from the District Court, Tenth Judicial District, Colusa County.

The plaintiff entered one hundred and sixty acres of land as a preëmtioner, and the thirty acres was a part of it.

The complaint alleged that the fence was worth three hundred and sixty dollars, and the building forty dollars.

The other facts are stated in the opinion.

W. C. Belcher and *N. E. Whiteside*, for the Appellants, argued, that the house being personal property, the defendants had a right to remove it, and cited *Crelling v. Tafnell*, Bull. N. P. 34; *Van Ness v. Packard*, 2 Pet. 37; *Holmes v. Tremper*, 20 Johns. 28; *King v. Welcomb*, 7 Barb. 265, and *Whiting v. Barstow*, 4 Pick. 310. They also argued, that the Legislature did not transcend its powers by the Act of March 30, 1868, authorizing improvements to be removed from public lands, as the law only, in effect, made such improvements personal instead of real property, and that the rule making improvements attached to the soil pass with the land, was purely arbitrary, and could be changed by judicial construction or Legislative enactment; and cited, *Poole's case*, 1 Salk. 368; *Lawton v. Lawton*, 3 Atkyns 13; *Penton v. Robart*, 2 East 88 and 2 Peters, *ante*, and the other

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cases there referred to. They also cited, *Doty v. Gorham*, 5 Pick. 490; and *Brown v. Lillie*, 6 Nev. 244. They argued that the United States had invited citizens to settle on the public lands, and that when they thus settled they became tenants at will, and had a reasonable time to remove their improvements. They also cited, *Jones v. Carter*, 12 Mass. 314; *Ross v. Irving*, 14 Ill. 174; and *Pacquette v. Pickens*, 19 Wis. 222, as to the validity of the Act of March 30, 1868.

S. T. Kirk, for the Respondent, argued that the Court had not jurisdiction of the case, as the judgment was only for two hundred and twenty-five dollars, and that the case of *Collins v. Bartlett*, 44 Cal. 371, was the first reported case on a statute like that of March 30, 1868, and that if the right to remove improvements did not exist without the Act, it did not exist with it; and that no third party could attach conditions to the right of the general government to sell its lands. That the party who placed improvements on public lands did so with his eyes open, knowing the land might be entered, and therefore could not complain. He also argued that the authorities cited by the appellant's counsel did not apply, as there was no tenancy between the government and the defendants, as it was a mere naked possession on their part.

By the Court, CROCKETT, J.:

This is an action to recover a small frame building, and certain fencing materials, alleged to have been the property and in the possession of the plaintiff, and to have been wrongfully removed, and to be unlawfully detained by the defendants. The answer—1st, denies all the allegations of the complaint; 2d, the plaintiff's title; and avers that the title and right of possession are in the defendants; 3d, avers that without the fault of the defendants, the property has been consumed by fire. Judgment was entered for the plaintiff, and the defendants appeal.

It appeared at the trial that in the year 1864, the defendants inclosed with a fence thirty acres of the public land of the United States, and erected upon the tract a small frame building, set upon blocks, resting upon the

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ground; that in July, 1872, the plaintiff received from the United States a patent for a larger tract, which included the thirty acres; that he commenced an action against the defendants to recover the thirty acres, and in September, 1872, obtained a judgment of restitution; that before the judgment was executed, the defendants removed the fences and building from off the thirty acres on to their own premises, where the fencing material was destroyed by fire, before the commencement of this action. It was also proved that the value of the building was twenty-five dollars, and that the fences as they stood on the ground were worth two hundred dollars; but after removal, the materials were worth only seventy-five dollars. This was all the evidence. The judgment was for a return of the property; and if a return could not be had, then for the value, assessed at two hundred and twenty-five dollars.

The defendants' counsel rely with much earnestness upon the Act of March 30, 1868 (Statutes 1867-8, p. 708) as furnishing a complete defense to the action. The Act provides that "any inhabitant of this State, who has put or placed improvements upon any lands belonging to this State or to the United States, or who has the right of possession of such improvements on said lands, shall have the right to remove such improvements from such lands at any time within six months after such lands shall have become the private property, by purchase or otherwise, of any person or persons, firm, corporation or company, either within or without this State; and such inhabitant shall not be liable to an action for damages for the removal of such improvements within the time above stated. All houses, barns, sheds, out-houses, buildings and fences, and all orchards and vineyards, shall be deemed and held to be improvements, within the meaning of this Act."

In *Collins v. Bartlett*, (44 Cal. 371), we had occasion to consider the validity of this statute, so far as it authorizes the removal of improvements which were attached to the soil and had become a part of the freehold; and we held that in respect to improvements of that character, the Act interferes with the primary disposal of the public lands by

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the United States, and is in violation of the Act of Congress admitting California into the Union. In an able and elaborate brief by the defendants' counsel, we are urged to review that decision. But after careful consideration, we adhere to the views expressed in that case. If, however, the cabin and fences were not attached to the soil, and formed no part of the realty, but were mere personal property, the United States had no interest in them to convey, and they did not pass to the plaintiff under the patent. The cabin, certainly, was not a part of the realty. It was set upon blocks, resting on the surface of the ground, not attached to the soil, and removable without disturbing the land in any way. Not being annexed to the soil, it was not a part of the realty, and the plaintiff had no title to it. (*Sands v. Pfeiffer*, 10 Cal. 258; *Tyler v. Decker*, Id. 435; *Merritt v. Judd*, 14 Id. 59.)

The Court, therefore, erred in awarding to the plaintiff the value of the cabin. Nor is there anything in the findings or evidence to show with certainty that the fence was annexed to the soil. It is described by the witnesses only as a fence composed of posts and boards, and as enclosing the thirty acres. But there is no evidence as to the manner in which the fence was constructed, nor whether the posts were set in the ground. For aught that appears, it may have been a portable fence, resting wholly on the surface, and in no manner annexed to the freehold. But if the posts were in fact set in the ground, as is the usual custom, so that the fence was a part of the realty, the Court below erred in the measure of damages. It finds that the fence, as it stood before its removal, was worth in its place on the ground two hundred dollars, and awards damages for that sum; but the plaintiff testified (and there is no other evidence on the point) that, after removal, the materials were worth only seventy-five dollars; and the action is replevin for the materials. If the plaintiff had sued for the damage to the freehold, he might have recovered the value of the fence as it stood, if it was a part of the realty. But having elected to sue in replevin for the materials as personal property, he can only recover their value as such.

Statement of Facts.

The specifications in the statement are not very satisfactory on this point; but we think they are sufficient to enable us to review the action of the Court below.

Judgment reversed and cause remanded, with an order to the Court below to modify the judgment by reducing the damages to seventy-five dollars.

Remittitur forthwith.

Mr. Justice RHODES did not express an opinion.

[No. 8,004.]

IN THE MATTER OF THE ESTATE OF THOMAS MILLER,
DECEASED.

CONSTRUCTION OF "MONEY" IN A WILL.—The word "money," used in making a devise in a will, will be construed to include both personal and real property; if it appears from the context, and on the face of the instrument, that such was the intention of the testator.

APPEAL from the Probate Court of the City and County of San Francisco.

The will was admitted to probate on the 11th day of August, 1868. On the 26th day of October following, the executors returned to the Court, an inventory of the estate of the deceased, in which the real estate was appraised at nineteen thousand seven hundred and fifty dollars, and the personal property at eleven thousand four hundred and seventy-six dollars. On the 14th day of January, 1870, the executors had paid the debts, legacies, and expenses of administration, and had in their hands the sum of one thousand two hundred and twelve dollars and nine cents in money, and filed a petition for a distribution of the same. The deceased left, him surviving, as heirs at law, his mother, Ann Miller, his sisters of the whole blood, Mary Ann Luke, Sarah McMillan, Honor Farrell, Maria S. Miller and Lottie J. Waters, his brother of the whole blood, George Miller, and sisters of the half blood, Frances Holborn and Emma Bennett.

Argument for Appellant.

Ann Miller, the mother, had died on the 20th day of March, 1869, and George Miller was the administrator of her estate. Emma Bennett, the half sister of the deceased, filed a petition, in which she prayed that one ninth part of the real estate might be distributed to her, and one ninth part of the rents and profits thereof, subsequent to the death of the testator. The Court appointed an attorney to represent the absent heirs. After argument, the Court entered a decree distributing the residue of the estate in the hands of the executors to George Miller, administrator of the estate of Ann Miller. Emma Bennett appealed.

The other facts are stated in the opinion.

M. C. Blake, for the Appellant.

That part of the will, "I give, devise and bequeath, all the estate, real and personal, or mixed, of which I may die seized or possessed, or in any way entitled," is introductory, and nothing passes to any one by it. At the end of the next clause, numbered the "First," only the sum of one hundred dollars has been given, and notwithstanding all that precedes it, if there had been no further bequest, only one hundred dollars would have passed under the will. At the end of the first six of the numbered sub-divisions, only certain sums of money and a promissory note have been disposed of, and at the end of the seventh, only these sums, the note, and the balance of money. Everything that passes under the will, passes by virtue of the seven numbered sub-divisions. Strike out the disputed clause, and the will is not materially affected — the note, the sums of money, and the balance of money still pass. Strike out the numbered sub-divisions, and nothing passes. The clause in question, then, whatever may be its significance, is simply introductory; but, what is more to the point, it is the kind of clause which the Courts call introductory. In *Beall's Lessee v. Holmes*, 6 Har. and Johns. 205, Buchanan, Ch. J., says: "It appears that James Beall made his will, in which, immediately after an introductory clause in these words, 'as touching my worldly estate wherewith it has pleased God to bless me in this life, I give, devise and dis-

Argument for Respondent.

pose of in the following form and manner, viz,' he proceeds: '*Imprimis*, I give and bequeath,' " etc. In the same case the same learned Judge says: "In *Doe v. Allen*, 8 Term R. 477, the introductory words of the will are, "as to ~~what~~ real and personal estate it has pleased Almighty God to bless me with, I give and dispose of the same as followeth.' " (See other cases referred to in the same connection.) In *Sheafe v. Cushing*, 17 N. H. 508, Parker, Ch. J., speaks of a clause nearly identical in words, and entirely identical in sense, with the one before the Court, as the introductory clause, and of the next clause, as the devising clause.

Jarboe, and *Harrison & Robinson*, for Respondent.

The disposing part of the will reads as though the testator had said, "I give, devise and bequeath all the estate, real and personal, or mixed, of which I may die seized or possessed, as follows: that after paying certain legacies, my mother receive the balance of my money, for her benefit as long as she lives, and for her heirs after."

This, although an inelegant expression, would be transposed by the Court, under its powers so to do in order to ascertain the intention of the testator, (1 Redf. 431; 10 Paige, 152), so as to read, "I give, devise and bequeath the balance of my money, viz: all the estate, real and personal, or mixed, of which I may die seized or possessed, after paying certain legacies, to my mother, for her benefit as long as she lives, and her heirs after."

The respondents contend that this is the correct rendering of the testator's intention, as expressed by the will, and further, that if the will had been so drawn, the appellant would not be entitled to any portion of the estate.

Redfield (2 Redf. 437, note) says: "The word 'money' is often and popularly used as equivalent to 'property' and accordingly has received a similar construction in some of the cases upon wills."

It is true that the literal significance of "money" is "stamped metal," yet Courts have always extended the meaning of the word to other objects, when such appeared to be the intention of the testator.

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In *Boys v. Morgan* (3 Mylne and Craig, 661,) the will read, "I guess there will be found sufficient in my banker's hands to defray and discharge my debts, which I hereby desire Mrs. Eliza Morgan to do, and keep the residue for her own use and pleasure." It was held that by this clause "stock" was bequeathed to Mrs. Morgan.

"Experience shows that the word 'money' is often used in the sense of property," said Lord Langdale in *Dawson v. Gaskoin*, 2 Keen, 18, and held that by the phrase "whatever remained of money," all the personal estate passed to the legatee. (See also, *Legge v. Askill*, T. & R. 265, note; *Kendall v. Kendall*, 4 Russ. 360; *Chapman v. Reynolds*, 28 Beav. 221.)

By the Court, CROCKETT, J.:

This appeal is from an order of the Probate Court, making a final distribution of the estate of Thomas Miller, deceased, who left a last will and testament, which was duly probated, and of which the following is a copy:

"In the name of God, amen. I, Thomas Miller, of the City and County of San Francisco, State of California, being in good health and body and of sound and disposing mind and memory (praise be to God for the same), and being desirous of settling my worldly affairs while I have strength and capacity to do so, do make and publish this my last will and testament. That is to say:

"I give, devise, and bequeath, all the estate, real and personal, or mixed, of which I may die seized or possessed, or in any way entitled;

First. To the Powell St. M. E. Sunday-school, one hundred dollars;

"Second. One thousand for building a family vault under the superintendence of my executors;

"Third. One thousand dollars to be expended in educating Richard and Mary Ann Luke's sons, viz., Eddy, Richard, and Thomas, the said sum to be truly and faithfully applied to the purpose above stated, in the best manner that my executors can devise;

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“Fourth. One certain note which I hold against Cutler Eldridge Waters and E. T. Batters, for one thousand dollars, to Freddy, son of E. Dewey and Lottie J. Waters, his wife. Said Lottie J. Waters to receive the income from said note until said Freddy Waters becomes twenty years of age, or at the executor's option.

“Fifth. To Honor and Maria S. Miller each two thousand dollars.

“Sixth. To each of my executors, five hundred dollars for their trouble, and that they be not required to give bond.

“Seventh and lastly. That my mother receive the balance of my money for her benefit so long as she lives, and for her heirs after.

“All to be settled and divided as herein mentioned by Donald McMillan, George Miller, and Henry W. Bennett, whom I appoint my sole executors.”

The controversy hinges upon the construction to be placed upon the word “money” in the seventh clause; and the question is whether that word, in the connection in which it is used, is to be interpreted as including the real estate of the testator. It is conceded by the appellant that the word “money” in wills has been frequently construed by the Courts, both in England and America, to include the personal estate of the testator. The following authorities would seem to place this point beyond all doubt: *Dawson v. Gaskoin*, 2 Keen, 14; *Boys v. Morgan*, 3 Mylne & Craig, 661; *Kendall v. Kendall*, 4 Russ. 360; *Chapman v. Reynolds*, 20 Beav. 221; *Levinson v. Lady Lennard*, 34 Beav. 490; *Morton v. Ferry*, 1 Metc. 446; *Cowling v. Cowling*, 26 Beav. 452; *Langdale v. Whitfield*, 4 Kay & J. 436; 2 Redfield on Wills, 111, 2d ed.; 2 Williams on Executors, 1,025; 2 Redfield on Wills, 437, note; Jarman on Wills, chap. 24, and cases there cited.

The doctrine of the authorities is, that in order to construe a devise of “money” as including the personal estate, it must appear from the context and on the face of the will that such was the intention of the testator, and that he used the word “money” as the equivalent of “personal estate.”

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But the appellant, whilst conceding the rule in respect to personal estate, contends that a devise of "money" cannot be held to include the real estate. We are unable, however, to perceive why, under our probate system, and laws of descent and distribution, there should be any distinction, in this respect, between the real and personal estate; and have been referred to no authority, which, in terms makes any such distinction. It may be that in England, where it is the policy of the government to perpetuate real estate in families, rather than to disseminate it in small parcels among the masses; and, possibly, in some of the American States, where the real estate passes immediately to the heir, and is not assets in the hands of the administrator for the payment of debts, a more stringent rule of interpretation might be favored, whereby a devise of "money" would be held not to include the real estate, under any circumstances. But in this State, both the real and personal estate are assets in the hands of the administrator for the payment of debts, with only this distinction between them, viz: that the personalty must be first exhausted before the realty can be so applied, and our policy, unlike that of England, is to disseminate real estate, rather than to perpetuate it in families. Hence, we should adopt the more liberal interpretation, whereby, in construing a devise of this character, the real and personal estate would be placed on the same footing. Nor can we see why, on principle, there should be any difference between them. A devise of "money" is held to include the personal estate only when it appears on the face of the will, construed in the light of the surrounding facts that such was the intention of the testator; and we can see no reason why the same rule ought not to be applied to the real estate.

Inasmuch as the appellant concedes that the devise in the seventh clause of the will is sufficient to include the personal estate, it is perhaps unnecessary, after what we have said, to inquire whether it also includes the realty; because the same process of reasoning by which it is shown to include the personalty, will, on our theory, establish that it includes the realty also. We will add, however, that in

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our opinion, it sufficiently appears on the face of the will, that the testator intended to devise to his mother the residue of his entire estate, remaining after the payment of the specific legacies, enumerated in the first six clauses. The will was evidently drawn up by an illiterate person, and the intention of the testator is awkwardly expressed. But after stating, in the introductory portion, that it was his intention to devise "all the estate, real and personal or mixed, of which I may die seized or possessed, or in any way entitled," he proceeds, in the six following clauses, to make certain specific bequests; and then concludes by expressing the intention, "that my mother receive the balance of my money for her benefit as long as she lives, and for her heirs after." The word "money" was evidently used in its widest and popular sense, in which it is frequently employed as synonymous with "property" or "estate." The word "money" is often and popularly used as equivalent to "property," and accordingly has received a similar construction in some of the cases upon wills. (2 Redfield on Wills, 437.)

Judgment and order affirmed. Remittitur forthwith.

[No. 3,280.]

JAMES A. BLOOD v. JOHN C. FAIRBANKS.

SUIT IN EQUITY BY PARTNER FOR AN ACCOUNTING.—If two men are in partnership for a term of years, in the care and one half the increase of a flock of sheep, under a contract with the owner of the flock, who receives the other half of the increase, and the owner buys the interest of one through fraudulent representations that he has purchased the interest of the other, and then takes possession of the flock and increase, the remedy of the partner who has not sold, is in equity for an accounting, and in such action the partner who sold is a necessary party. In such case an action at law for damages does not lie.

WHEN CASE WILL BE SENT BACK WITH LEAVE TO AMEND COMPLAINT.—When the plaintiff mistakes his remedy and brings an action at law for damages, and his proper remedy is a bill in equity for an accounting, and leaves out a necessary party, but inserts some averments in the complaint which entitle him to some measure of equitable relief, the Ap-

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pellate Court will not dismiss the action, but will send the case back, with leave to amend the complaint.

APPEAL from the District Court, First Judicial District, Santa Barbara County.

The plaintiff brought this action for damages, alleging that he and Hewitt took a herd of sheep from the defendant, under a contract of which the following is a copy:

“ This agreement made at Santa Barbara, California, between John C. Fairbanks of the first part, and James A. Blood and Rosewell R. Hewitt of the second part, witnesseth: That the said party of the first part agrees to furnish to the said parties of the second part twenty-seven hundred American ewes, to be kept, tended, and pastured by the said parties of the second part, in the county of Santa Barbara, for the term of three years from the first day of August, A. D. 1869, at and for one half of the increase thereof; and the said parties of the second part agree to receive the said 2,700 ewes, and to care for, manage, and pasture the same and their increase, and to pay all cost of the tending, range, and shearing of the same and the sacking of the wool, dividing between the parties hereto, and not to remove the said flock or their increase out of the county of Santa Barbara, except by the written consent of the party of the first part first obtained, and at the expiration of three years from the first day of August, A. D. 1869, to return an equal number of grown ewes, viz: 2,700; the balance of the flock shall then be divided into two equal parts, of which one shall belong to the party of the first part, and the other to the parties of the second part. It is agreed and understood by and between the parties hereto that during the term of this agreement the said parties of the second part shall not take any other sheep into the said flock. It is further agreed that the cost of the rams for the said flock shall be for the first year borne by the party of the first part, and that he shall supply at the rate of twelve rams per thousand head of ewes, and the cost of the rams necessary to be bought after the first year shall

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be borne between them, one half by the party of the first part and one half by the parties of the second part. It is further provided, that if the party of the first part shall employ a man to keep, tend the said flock, the said man shall be entitled to receive, as a compensation for his services, one fourth part of the estimated increase of 1000 head of ewes of the said flock, including the wool corresponding to said fourth part of said 1,000 ewes; but the parties of the second part shall be entitled to their half of wool that may be sheared previous to the time that said man shall actually help tend said flock; and the said man who may be furnished to help tend the flock shall bear his proportion of the expenses of the range, and other expenses of tending the flock corresponding to his share of the increase thereof.

(Signed:) “JOHN C. FAIRBANKS, [L. s.]
 “JAMES A. BLOOD, [L. s.]
 “R. R. HEWITT, [L. s.]

“Santa Barbara, 28th August, A. D. 1869.”

The complaint alleged that the plaintiff and Hewitt received the sheep on the day named in the contract, and from and after said day, cared for and pastured the sheep on the rancho La Colonia, in the county of Santa Barbara, until about the 28th day of February, 1870, when the defendant purchased Hewitt's interest in the sheep and increase and in the contract, and induced Hewitt to sell by false representations that he had purchased from the plaintiff, and that defendant, on said 28th day of February, took all the sheep, and the increase, numbering fifteen hundred, and drove them away without the plaintiff's consent, and refused to deliver them to the plaintiff. There was an averment that the plaintiff had paid out large sums of money for wages of herdsmen, and in the care of the sheep while they were in his and Hewitt's possession, and that the increase of the sheep and wool to which the plaintiff was entitled under the contract up to August 1, 1872, were of the value of eight thousand dollars. Judgment was asked for ten thousand dollars.

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The cause was tried by a jury. The plaintiff recovered judgment, and the defendant appealed.

The complaint was not demurred to.

Charles E. Huse, for the Appellant.

Fernald & Richards, for Respondent.

At the October term, 1872, the Court reversed the judgment, with directions to the Court below to dismiss the action.

Fernald & Richards and *Edward J. Pringle*, for the Respondent, filed a petition for rehearing, in which they argued that if the plaintiff had mistaken his remedy, the Court should not dismiss the action, but allow him to make Hewitt a party, and so reach the relief to which he was entitled; and cited *Grain v. Aldrich*, 38 Cal. 518; *Poett v. Stearns*, 28 Cal. 226, and *Crosby v. McDermitt*, 7 Cal. 146.

The following opinion was delivered on rehearing.

By the Court, NILES, J.:

In the former opinion rendered in this case, we said: "Though it is alleged in the complaint that Fairbanks succeeded in effecting a purchase of the interest of Hewitt, through the false representation made to the latter that Blood had already sold, yet, as Hewitt does not appear to complain of the fraud, the sale of his interest to Fairbanks was valid to operate a dissolution of the copartnership, which, it is conceded, had theretofore existed between Blood and Hewitt under their contract with Fairbanks; and the latter having taken possession of the subject-matter of the copartnership, the remedy of Blood is in equity and for an accounting, as in other cases in which an existing copartnership is terminated by the sale of all the interest of one of the copartners in the assets of the firm; and in such a proceeding Hewitt would be a necessary party."

We adhere to the views then expressed; but, as some

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facts are averred in the complaint which would entitle the plaintiff to some measure of equitable relief in the nature of an accounting — provided all necessary parties were before the Court — we think the cause should be remanded for a new trial, and that plaintiff have leave to amend his complaint.

Judgment reversed, and cause remanded for a new trial. Remittitur forthwith.

[No. 3,285.]

W. F. WHITTIER AND WILLIAM P. FULLER v. J. W. WILBUR ET AL.

LIENS OF MECHANICS AND MATERIAL MEN.— There is no constitutional objection to a statute securing a lien to material men, who, at the instance of a contractor, furnish him with materials which are used in the construction of the building, provided the aggregate liens do not exceed the contract price, as fixed by the owner and contractor.

IDEM.— If the statute gives the material man a lien on the building for materials furnished by him to a contractor who contracts with the owner, the contractor and owner cannot deprive the material man of his lien, by a clause in the contract, by which the contractor agrees to indemnify the owner against any liens taken by persons furnishing materials to be used in constructing the building.

IDEM.— If the material man obtains judgment against the owner, and against the property, the owner may deduct the amount of the judgment from any sums due the contractor, on the contract price.

APPEAL from the District Court, Twelfth Judicial District, City and County of San Francisco.

On the 23d of November, 1869, Rachel B. Vancleve, who was the owner of a lot on Post street, in San Francisco, entered into a contract with George Coffran, Joseph Nougues and J. W. Wilbur, by which they agreed to furnish the materials and erect for her, on the lot, a building, and she was to pay them the sum of thirteen thousand nine hundred dollars. The contract contained the following clause:

“ And the parties of the second part, hereby agree to

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save, keep harmless, and indemnify the party of the first part, and the said building, and also the said land and the owner or owners thereof, of and from any liens, claims or notices of liens by persons performing labor upon or furnishing materials to be used in the construction of the said building, and from all costs, expenses, counsel fees, damage and injury arising, or that may arise, from the assertion of any such liens, claims, or notice of liens."

A large number of persons furnished Coffran, Nougues and Wilbur, materials, which were used in the construction of the building, and among the number Whittier and Fuller, the plaintiffs here. These material men filed liens under the Lien Act of 1868. The plaintiffs brought this action to enforce their lien, and made the owner of the building, and the other lien holders, parties defendant.

They averred in their complaint, that the building was erected under the contract, and that the goods were furnished to the contractors, and that the contractors were the agents of the owner. The other lien holders answered, setting up by way of cross complaint, their liens, and asking to have them enforced.

The owner answered, setting up that all the work and labor done on the building, and all the materials furnished for it, were done and furnished under the contract, and annexed a copy of the contract to the answer. When the cause came on for trial, the owner moved for judgment in her favor on the pleadings. The Court granted the motion, holding that the Lien Act of March 30, 1868, was unconstitutional. The plaintiffs, and the defendants who claimed liens, appealed from the judgment.

The Lien Law of 1868 gives a lien to all who labor on or furnish materials for the construction of a building, and provides that the contractor who has charge of the construction of a building, shall be held to be the agent of the owner, for the purposes of the Act.

Porter, Holladay and Weeks, for the Appellants, argued that the contract between the contractors and owner, by which the material men were not to have a lien, was a con-

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tract that third persons should not have the benefit of a statute made expressly for them, and therefore void as to third persons, but could be enforced as a covenant of the contractors, and was intended merely for the protection of the owner.

They also argued that the law was not unconstitutional as impairing the obligation of contracts between contractors and owners, as the law existed before the contract, and the contract was made in view of it; and cited, *Ogden v. Saunders*, 12 Wheat.; and Story on Constitution, Sec. 1374.

Jarboe & Harrison, for Respondents, argued that the rights of material men must be controlled by the contract between the owner and contractor; and cited, *Henley v. Wadsworth*, 38 Cal. 361; *Shaver v. Murdock*, 36 Cal. 293, and *Blythe v. Poultney*, 31 Cal. 233. They also argued that the law was unconstitutional, and violated sections one, eight and twenty-one of Art. I, because it prevented the owner from contracting with the builder that no lien should be created on the building, and permitted material men to compel the owner to pay more than the contract price, and made the contractor the agent of the owner; and cited, *Hooker v. New Haven and Northampton Co.* 14 Conn. 146; *Canal Appraisers v. People*, 17 Wend. 604, and *Pratt v. Brown*, 3 Wis. 613.

Porter, Holladay and Weeks, in reply, argued that the maritime law made the master the agent of the owners in the purchase of materials, and that the lien law did no more, and that the contract between the owner and builder was an attempt to evade the law.

By the Court, McKINSTRY, J.:

We can see no constitutional or other objection to a statute securing a lien to a material man for the value of the materials which have gone into a building; provided, the aggregate liens do not exceed the contract price as fixed by the owner and original contractor.

And in such cases the contractor and owner cannot de-

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prive the material man of his lien by introducing a stipulation into the building contract, by which the contractor agrees to indemnify the owner against any lien by persons furnishing materials to be used in the construction of the building.

In case of judgment on behalf of the material man against the owner and his property, the latter is entitled to deduct from any sum due the contractor, the amount of such judgment. (Stats. 1867-8, p. 592.)

On the present appeal it does not appear that the asserted liens amount to the contract price, or that such price was paid when this action was commenced, or the liens were filed.

Judgment reversed and new trial ordered.

Mr. Justice RHODES did not express an opinion.

[No. 3,271.]

JAMES H. CUTTER v. A. CARUTHERS, DANIEL FLINT, A. CRAW, C. W. FRAME, C. BROCKWAY, HOWELL CLARK, R. W. MERKLEY, PATRICK CARROLL AND JOSEPH GRONDEN.

RULES OF DISTRICT COURTS.—The Supreme Court does not take judicial notice of the rules of the District Courts. When a party relies on such rules he should have them incorporated in the record.

EVIDENCE OF BOUNDARY OF LAND.—A tract of land, called the "McDougal tract," when conveyed, was intended by the parties to be bounded on the south by another tract called the "McKinstry tract:" *Held*, that a deed conveying the "McKinstry tract," given after the conveyance of the "McDougal tract," was not admissible in evidence to show the southern boundary line of the "McDougal tract," nor for the purpose of showing what lands the owners of the "McDougal tract," when they received their deed, supposed the owners of the "McKinstry tract" held.

OBJECTION TO A DEED AS EVIDENCE.—It is not a good objection to the introduction of a deed in evidence, that it is not shown to include the premises in controversy. The calls of the deed are to be located after it is received in evidence. If it appears on the face of the deed that it does not include the premises in controversy, it may be objected to on that ground.

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JURISDICTION OF DISTRICT COURTS OVER EXECUTORS.—The District Courts may in certain cases have jurisdiction to order an executor to convey lands.

APPEAL from the District Court, Sixth Judicial District, County of Sacramento.

Ejectment to recover a tract of land bounded as follows: "Commencing at a point on the easterly bank of the Sacramento river, at the northwest corner of a tract of land conveyed by John A. Sutter, Jr., to George McKinstry, Jr., John A. Sutter, Theodore Cordua, and John Bidwell, by deed bearing date April 4th, 1849, and known as the 'McKinstry Tract,' and running thence easterly along the northerly line of said 'McKinstry Tract' one mile; thence northerly one half mile; thence westerly and parallel with the north line of said 'McKinstry Tract' to the Sacramento river; thence down stream and along the easterly bank of said Sacramento river to the place of beginning."

The complaint alleged an ouster on or about the 13th day of February, 1868. The answers contained a general denial.

The premises in controversy were a portion of the grant made by the Mexican nation to John A. Sutter, on the 18th of June, 1841, and patented by the United States to Sutter on the 20th of June, 1866. The plaintiff proved that said Sutter conveyed the demanded premises to John A. Sutter, Jr., on the 14th of October, 1848. The plaintiff offered in evidence a deed from John A. Sutter, Jr., to George McDougal, dated June 19th, 1849. The defendant objected that this deed did not include the land in controversy. The Court asked the plaintiff's counsel if he expected to prove that the land described in the deed was within the limits of the patent of Sutter. The counsel answered yes; whereupon the Court overruled the objection. This deed conveyed the following tract of land:

"A piece of land situate on the south-easterly side of the Sacramento river, in Upper California, described as follows: Commencing at a point above and adjoining the tract of land held by McKinstry & Co., situate and adjoining the

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present town site of Suttersville, running parallel and back from the river of said tract of one half mile in breadth of McKinstry & Co. the distance of one mile; thence running in a straight line in a north-easterly direction one half mile; thence one mile towards the river Sacramento; thence one half mile to the point intersecting the said land held by McKinstry & Co., the whole to include one mile in length and one half mile in breadth, immediately adjoining and running with parallel lines with the half mile held by McKinstry & Co.; also all that piece or parcel of land lying between the last named line above described and the Sacramento river."

The plaintiff then offered in evidence a deed from McDougal to Jonathan D. Stevenson and W. C. Parker, which was objected to for the same reason, but received by the Court, and a deed from Parker to Hart also objected to for the same reason, and received. The plaintiff offered in evidence a certified copy of a decree made by the District Court of the Fourth Judicial District, in the suit of J. D. Stevenson v. Mary Hart, Executrix of the Will of Wm. Hart, deceased, rendered August 11, 1860. This decree required the defendant, as executrix, to make and deliver to the plaintiff a deed of one undivided half of the premises in controversy. No other papers in the action were offered in evidence. The plaintiff then offered a deed from Mary Hart, as required by the decree. The plaintiff, by several mesne conveyances, deraigned title from Stevenson.

The plaintiff, also, for the purpose of showing the boundary of the McDougal tract, offered in evidence a deed from John A. Sutter to L. W. Hastings, dated November 30, 1849. The defendant's attorney objected to it as irrelevant. The Court overruled the objection.

The plaintiff, also, for the purpose of showing the boundary of the McDougal tract, offered in evidence two deeds from John A. Sutter, Jr., to John A. Sutter, Sr., Theo. Cordua, George McKinstry, Jr., and John Bidwell. The first was dated April 4th, 1849, and the second was made as explanatory of the first, and was dated July 1st, 1850. The defendant objected to these deeds as irrelevant, but

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the Court overruled the objection. The first of said deeds conveyed the following:

“All that piece or parcel of land, situated, being, and lying in the Territory of California, bounded and described as follows, to wit: commencing at the northwest corner of the town of Sutterville, adjoining the part of said town now belonging to L. W. Hastings, Esq.; thence running up Sacramento river one half mile — said line to commence at low water-mark; thence running back on a line running at right angles with the aforesaid line of Hastings' to the distance of one mile; thence running southerly on a line parallel with the river bank one half of a mile; thence running in a direct line to the place of beginning.”

The second deed was as follows:

“This indenture, made the 1st day of July, in the year of our Lord one thousand eight hundred and fifty, between John A. Sutter, of Hock Farm, in the county of Sutter, State of California, of the first part, and John A. Sutter, Theo. Cordua, Geo. McKinstry, Jr., and John Bidwell, of the second part, witnesseth: that, whereas, the said John A. Sutter, by his certain deed, bearing date the fourth day of April, A. D. one thousand eight hundred and forty-nine, for a valuable consideration, conveyed a certain tract of land to the said parties of the second part, which tract or parcel of land is described in said deed as follows, to wit: commencing at the northwest corner of the town of Sutterville, adjoining the part of said town now belonging to L. W. Hastings; thence running up the Sacramento river one half a mile — said line to commence at low water-mark; thence running back on a line running at right angles with the aforesaid line of Hastings to the distance of one mile; thence running southerly on a line parallel with the river bank one half a mile; thence running in a direct line to the place of beginning. And, whereas, the said deed does not fully and clearly describe the boundaries of the land intended to be conveyed thereby; therefore, know all men by these presents, that it was my full intent and meaning to convey by the aforesaid deed, bearing date the said fourth

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day of April, in the year of our Lord one thousand eight hundred and forty-nine, all the land therein described, together with all the land lying between the north and the south boundaries of said tract, and a line extending northward in continuation of Hastings, or the eastern boundary line of the town of Sutter, and the Sacramento river. And these presents are intended to be explanatory of my full intent, purpose, and meaning as intended at the date thereof to be expressed in the aforesaid deed, bearing date on the aforesaid fourth day of April, in the year of our Lord one thousand eight hundred and forty-nine; and this indenture is hereby made a part and parcel of the aforesaid deed, so executed as aforesaid, on the said fourth day of April, A. D. eighteen hundred and forty-nine."

After the record evidence was completed, the plaintiff introduced parol evidence, to show the location of the ground in controversy.

The trial was concluded, and the Court took the case under advisement on the 21st day of November, 1870. On the 8th day of August, 1871, the plaintiff gave notice of a motion to set aside the order of submission, and for leave to introduce further evidence. The motion was made and granted on the 1st day of September, 1871, and the plaintiff introduced additional testimony.

The plaintiff recovered judgment, and the defendant appealed from the judgment, and from an order denying a new trial.

The other facts are stated in the opinion.

McKune & Welty, for the Appellants.

The Court erred in admitting in evidence the decree of the Fourth District Court, and the deed made pursuant thereto, for the reason that the District Court had not jurisdiction in matters of probate, or to decree that the executrix, as such, convey the land. The title (if there was any in the intestate,) vested in his-heirs, and the executrix could only sell under probate order to satisfy the lien of creditors. (*Brenham v. Story*, 39 Cal. 179.)

Presley Dunlap, for the Respondent.

The certified copy of the decree of the District Court of the Fourth Judicial District, in the case of *Stevenson v. Hart*, was properly admitted. The District Court had jurisdiction of the subject matter of the action in which the decree was rendered, as has been repeatedly held by this Court, *Brenham v. Storey*, 39 Cal., cited by appellants, has no application to the point in hand — the jurisdiction of the Probate Court over probate matters is not exclusive. (*Deck v. Gerkes Administrator, et al.* 12 Cal. 433; *Wilson v. Boach et al.* 4 Cal. 362.)

By the Court, RHODES, J.:

The plaintiff contends that there was no error in setting aside the order of submission and taking further testimony, because the rules of the District Court do not require any further notice of the motion than was given. This Court does not take judicial notice of the rules of the District Courts; and when a party relies upon such rules he should have them incorporated into the record. The error, however, was not productive of any injury to the defendant, for it appears that the only further testimony taken was a more particular description of a tract of land which had already been described by the surveyor in general terms, and by reference to a map then before the Court.

For the purpose of proving the boundaries of the McDougal tract, the plaintiff introduced the deed of Sutter to Hastings, dated November 30th, 1849, and two deeds of Sutter to McKinstry and others, dated respectively April 4th, 1849, and July 1st, 1850. The McDougal deed bears date June 19th, 1849. It was intended by the parties to the McDougal deed that the land thereby conveyed should be bounded on the south by the McKinstry tract — or, in the language of the record, “the tract of land held by McKinstry & Co.” The McKinstry deed of April 4th, 1849, was competent evidence, tending to prove the boundaries of the McKinstry tract; but the deed of July 1st, 1850, did not tend to prove what lands were held by McKinstry & Co. at the

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date of the McDougal deed — June 19th, 1849 — nor what lands the parties to the McDougal deed then understood McKinstry & Co. to hold.

The deed to Hastings is subject to the like objection, as it was executed after the date of the deed to McKinstry, as well as the deed to McDougal. Whether those deeds would have been admissible, if coupled with other evidence, it is unnecessary to determine, but in our judgment they should not have been admitted in evidence at the time and under the circumstances shown in the record.

The point is presented that the Court erred in admitting in evidence several deeds, on the ground that they were not shown to include the premises in controversy. It is difficult to conceive of a case in which that objection would be tenable, except when it appeared on the face of the deed that it did not include or relate to the premises in suit. When it does not so appear, the question is one of fact, to be determined upon the evidence. It is manifest that a party is not required to locate on the ground the calls of a deed, before the deed is admitted in evidence.

The defendant presents the point that the Court erred in admitting in evidence the decree in the case of *Stevenson v. Hart*, executrix, etc., on the ground that the Court had no jurisdiction to pronounce the decree. It does not appear from the decree (no other portion of the judgment-roll having been offered in evidence) that the Court did not have jurisdiction in that case. It is obvious that the District Courts may, in certain cases, have jurisdiction to order an executor to convey lands. The objection was not made in the Court below, and the point should not have been presented here.

Judgment and order reversed, and cause remanded for a new trial.

Argument for Respondents.

[No. 3,680.]

LAMORA SILVEY AND CHRISTOPHER SILVEY BY MARY ANN SILVEY, THEIR GUARDIAN AD LITEM, AND DAVID E. ALLISON AND LILLY ALLISON, BY SAID DAVID E. ALLISON, HER HUSBAND, v. SUSAN MEDORA HODGDON, CHARLES H. HODGDON, HER HUSBAND, AND THE PACIFIC MUTUAL LIFE INSURANCE COMPANY.

ASSAILING CREDIBILITY OF A WITNESS.—The credibility of a witness may be assailed by proof that he cherishes a feeling of hostility toward the party against whom he is called; and this hostility may be established by proof of the acts or declarations of the witness, provided his attention is first called to the particular acts or declarations proposed to be proved, with sufficient minuteness as to time and circumstances.

IDEM.—If it is proposed to assail the credibility of a witness by a letter in which hostility is shown to the party against whom he is called, and the letter is shown to the witness, and he denies writing it, the handwriting may be proved by other witnesses.

APPEAL from the District Court, Fourth Judicial District, City and County of San Francisco.

The plaintiffs, Lamora Silvey, Christopher Silvey and Lilly Allison, were the infant children of Anthony Silvey, whose life was insured.

The other facts are stated in the opinion.

J. M. Seawell and *Lake & Williams*, for the Appellants, argued, that the Court erred in not permitting defendants to prove by the witness George C. Hickox, that the letter was written by Almira Carey, as she had denied that she wrote it, and the letter manifesting great hostility to the appellant, her denial was a proper subject of contradiction; and cited *Baker v. Joseph*, 16 Cal. 173; *Rex v. Yervin*, 2 Camp. 638; *Long v. Larkin*, 9 Cush. 361; *Dervev v. Williams*, 43 N. H. 384; *Tyler v. Pomeroy*, 8 Allen, 480; *Collins v. Stephenson*, 8 Gray, 438; *Coombe v. Winchester*, 39 N. H. 18.

Sullivan & Turner, for the Respondents, argued that, as

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Almira Carey was asked by appellants' counsel, on cross-examination, if she wrote the letter, and denied writing it, they were bound by her answer, it being new matter called out by them.

By the Court, CROCKETT, J.:

The complaint alleges in substance, that one Silvey caused his life to be insured in the name of his married daughter, Mrs. Hodgdon; and at the time of making the application, Mrs. Hodgdon stated to him that if he would have the policy made payable to her, she would, on his death, instruct and cause the insurance company to pay the amount of the policy to his three minor children; that confiding in this statement, "it was then and there understood and agreed by and between them, the said Anthony Silvey and the said Susan, that such policy of insurance, with the name of the said Susan Medora Hodgdon as the payee thereof, should be so issued, and that the said Susan should cause the insurance company, on his death, to pay the amount of the policy to the three minor children;" and that said Susan should, in fact, be such payee, only in trust for the said minor children, and that such policy of insurance should in fact be only for the use and benefit of them, the said minors.

There is no averment that the agreement, as to the trust, was in writing. The complaint then avers that the policy was issued as agreed upon; and it appears on the face of the policy, a copy of which is annexed to and forms a part of the complaint, that the premium was paid by Mrs. Hodgdon; and that the policy is payable to her, "for her sole use, if living; or, if not living, to her heirs or legatees, in conformity with the statute."

It is further alleged that Silvey paid all the premiums, and is dead, and the policy has become payable; but that Mrs. Hodgdon denies the trust, and demands that the policy be paid to her for her exclusive use; that she and her husband are unable to respond in damages for a breach of the trust, and prays that the trust be established by the judgment of the Court, and that the policy be paid to the plaintiffs, who are the three minor children of Silvey. A

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judgment as prayed for having been entered for the plaintiffs, Mrs. Hodgdon and her husband prosecute this appeal.

The Court, on conflicting evidence, found the contract to have been proved as alleged; and we cannot disturb the finding on the ground that it was not justified by the evidence.

At the trial, one of the most important witnesses for the plaintiffs was a married sister of the plaintiffs and of the defendant, Mrs. Hodgdon. In her testimony she evinced considerable hostility towards Mrs. Hodgdon; and on her cross-examination a letter was produced by the defendants signed "Ida," and addressed to "My Dear Charles," on the face of which it appeared that the person to whom it was addressed was a married man, and not the husband of the writer. It is as follows: "When you come to see your Ida, knock three times, and do not ring the bell. Then I will know it is you, darling. How is that old woman? Is she declining every day? Does her heart trouble her as much as ever? Poor old hypocrite! Oh! Charles, it seems as if I cannot wait. I am afraid she may possibly live longer than you or I. Give her a dose; nobody will find it out. She is mad with all her relations, and none of them will trouble you — they all know what you married her for. * * * Come and see me, darling, as soon as possible. The present that you gave me, I cherish dearly. She — is always talking about that first husband of hers, and said she would like to see his baby. She speaks to him. I saw her myself, and, I believe, has been to see the child. Charles, I have so much to tell you. Good-bye, my darling. From your loving Ida."

On being shown the letter by the counsel for the defendants, the witness was asked whether she wrote it; to which she replied that she did not. Subsequently, the defendants called an expert in handwriting, and asked him whether the letter and the signature of the witness to an affidavit, admitted to have been made by her, and on file in the cause, were not in the same handwriting? On the objection of the plaintiffs, the question was excluded by the Court, and this ruling is relied upon as error. If the ques-

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tion had been accompanied by an offer to prove that the letter was in fact addressed to the defendant, Charles H. Hodgdon, or was intended for him, the evidence would have been clearly competent.

The credibility of an adverse witness may be assailed by proof that he cherishes a feeling of hostility towards the party against whom he is called; and it may be established by proof of the acts or declarations of the witness; provided his attention is first called to the particular acts or declarations proposed to be proved, with sufficient minuteness as to time and circumstance, to afford him an opportunity to explain. (*Baker v. Joseph*, 16 Cal. 173.) If this letter was in fact written by the witness, and was addressed or intended to be delivered to the husband of her sister, Mrs. Hodgdon, it would afford the most convincing proof not only of her moral depravity, but also of her bitter hostility to her sister; but there was no offer, in terms, to show that the letter was addressed to or was intended for the defendant, Charles H. Hodgdon. Nevertheless, we think enough had already been disclosed by the evidence to warrant a presumption that such was the fact, provided the letter was written by the witness, (on which point we, of course, express no opinion.) But if it be assumed that she was the author of it, the following facts which were in evidence, would tend to show that it was intended for the defendant, Charles H. Hodgdon: 1st. That Mrs. Hodgdon was divorced from her former husband, who is still living, and was a witness on the trial of this cause. In the letter, the wife of the person to whom it was addressed, is described as having a former husband living. 2d. The letter is addressed to "My Dear Charles," and Charles is Hodgdon's christian name; and, 3d. The letter describes the wife as "mad with all her relations," and the proof shows that Mrs. Hodgdon was at enmity with her mother and sisters; 4th. The witness admitted on the stand that she was not on friendly terms with her sister, Mrs. Hodgdon; 5th. The letter comes from the custody of the defendants, one of whom is claimed to have been the person to whom it was addressed. We think these circumstances are sufficient to show, *prima facie*, that the

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letter was intended for Hodgdon, if it be assumed that the witness was the author of it; and that the Court erred in excluding the testimony of the expert. Some other points have been discussed by counsel, but we deem it unnecessary to notice them.

Judgment and order reversed, and cause remanded for a new trial.

Mr. Justice RHODES did not express an opinion.

[No. 10,089.]

THE PEOPLE v. MILTON SHEPARDSON.

INDICTMENT AS PRINCIPAL AND ACCESSORY.—The Code has not changed the rule that an indictment may in one count charge the defendant as principal, and in another count charge him as an accessory.

CRIME OF ROBBERY.—A person who receives money obtained by robbery, with a knowledge of the manner in which it was obtained, cannot be convicted of the crime of robbery.

APPEAL from the County Court of Tehama County.

The defendant and William Fugit and Z. Calmeyer were charged in one count of the indictment with the crime of highway robbery, and in another count they were charged as accessories. He demurred to the indictment, on the ground that it charged the same offense in more than one form. The demurrer was overruled.

On the 26th day of September, 1871, four men armed with rifles, stopped the stage which carried the express, at Cottonwood Hill, in the county of Shasta, and robbed Wells, Fargo & Co.'s treasure-box.

The testimony for the prosecution tended to show that there were five men concerned in the robbery, whose names were, Wm. Fugit, Z. Calmeyer, John Grant, Wm. Cullen, and the defendant Shepardson. That the five arranged the plan to rob Wells, Fargo & Co.'s treasure-box on the stage, but that Shepardson, the defendant here, was in camp some miles distant when the robbery was committed, and waited

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there until the other four had committed the robbery, when they joined him, and the money obtained by the robbery, about two hundred and eighty dollars, was equally divided, Shepardson receiving his share. The Court gave, among other charges to the jury, the following: "An accessory is he who stands by and aids, abets or assists, or who, not being present aiding, abetting or assisting, hath advised and encouraged the perpetration of a crime. He or she who thus aids, abets or assists, advises or encourages, shall be deemed and considered as principal, and punished accordingly. And the inquiry is, whether the proof that the prisoner was accessory to the crime before the fact is admissible under the indictment. If you believe from the circumstances and facts proved that the defendant assisted in planning the robbery, or received a portion of the money taken at the time, with the knowledge of how it was obtained, he is an accessory, and you should find him guilty as charged."

The defendant was convicted, and appealed.

The other facts are stated in the opinion.

C. A. Garter, for the Appellant.

Attorney-General Love, for The People.

By the COURT:

1. The indictment first charges the defendants as principals, and, in a second count, as accessories, or rather as principals in the second degree. We see no objection to the indictment on this ground, under section nine hundred and fifty-four of the Penal Code. We think that that section, while changing the phraseology, did not alter the substance of section two hundred and forty-one of the Criminal Practice Act, which it supplanted.

2. But the judgment against the defendant is erroneous, because of the fifteenth instruction, in which the jury were told that, if the prisoner received a portion of the money obtained by the robbery, with the knowledge how it had been obtained, then he might be convicted of the crime of robbery charged in the indictment.

Judgment reversed and cause remanded for a new trial.

Statement of Facts.

[No. 3,553.]

IN THE MATTER OF THE ESTATE OF JANE N. MOULTON, DECEASED.

APPLYING SPECIAL BEQUEST TO PAYMENT OF DEBTS.— If the Probate Court makes an order applying the proceeds of the sale of a special bequest, made by the testator, to the payment of a debt, the executors cannot object that there are other special bequests besides that thus applied.

IDEM.— If a special bequest is applied to the payment of a debt, and there are other special bequests, the remedy of the one whose special bequest is thus applied, is to seek contribution from the others.

IDEM.— If the real estate has been sold, and if an order is made by the Probate Court applying the proceeds of a special bequest of personal property to the payment of a debt, it will be assumed that the personal estate not specially bequeathed had been thus applied, and that it was necessary thus to apply the proceeds of the special bequest, if the record does not show the contrary.

IDEM.— When the Probate Court makes an order applying the proceeds of a special bequest to the payment of a debt, and the will is not in the record, it will not be assumed that the Probate Court erred, in adjudging that the intention of the testator could be carried into effect, and yet sell the special bequest.

APPEAL from the Probate Court of the City and County of San Francisco.

Upon the application of J. P. Dinsmore, as assignee of a claim of two hundred and eighty-seven dollars for medical services, held by one Fraser against the estate of the deceased, and which had been allowed, the executors of the estate were directed to show cause why they should not pay the claim out of certain money in their hands, the proceeds of the sale of a specific bequest (household furniture), made by the deceased to one A. J. Quick. After a hearing of the cause, at which the facts stated in the opinion were elicited — and also the facts that the whole amount of the expenses of the sickness of the deceased as allowed, including Fraser's claim, was one thousand one hundred and seven dollars and thirty-three cents, none of which had been paid; that the funeral expenses had been paid; that the time for the presentation of claims had expired; that there was no property in the hands of the executors for the

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payment of the expenses aforesaid, except the legacies and devises, and that the bequest to Quick had been sold by his consent for eight hundred and ninety dollars and thirty-seven cents, the money being in the hands of the executors — the Court ordered that the eight hundred and ninety dollars and thirty-seven cents be applied to the payment of a dividend, in proportion to his claim, to each creditor, on account of the last sickness of the deceased, with interest on each claim from the date of its approval.

The executors appealed.

Barstow, Stetson and Houghton, for Appellant, argued that the Court erred in applying the special bequest to the payment of the debts, because, as they contended, there was other personal property not specially bequeathed, which should be first applied, and because there were other special legacies, and one legatee should not be called on to pay all the debts; and cited 2 Redfield on Wills, 584 Sec. 4; 1 Robber on Legacies, 315; *Merseraux v. Ryeras*, 3 Comst. 261; *Snow v. Cullum*, 1 De Sassure, 542; *Sleeck v. Thornington*, 2 Ves. Sen. 562; *Estate of Woodworth*, 31 Cal. 605; Probate Act, Secs. 151, 180.

S. P. Holway, for Respondent, argued that, the executors could not complain, and that Quick, if his legacy was taken, could apply for a contribution from the other legatees, and that, if the Court was of opinion that a special bequest could be sold, and still the intention of the testator carried out, there was no error in doing so, and cited Probate Act, Sec. 180; *Estate of Woodworth supra*; *Abila v. Burnett*, 33 Cal. 667.

By the Court, MCKINSTRY, J.:

If the order appealed from is proper in other respects, the executors cannot complain that there are other special bequests than that which the petitioner seeks to have applied to the payment of his claim. If there are other legatees, the remedy of him whose bequest is applied to the claim is to seek contribution from the others. (Probate Act, Sec. 181.)

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It appears that on petition of the executor, the real estate of the testatrix had been sold. This would only have been done when the personal estate was insufficient to pay the outstanding debts, etc. (Sec. 154.) It must be assumed that the residue of the personal estate had been applied to the payment of the debts, and that when the order appealed from was made, it was necessary to apply the proceeds of the articles specially bequeathed. (Sec. 151.)

It is true that it appears that there was due to the estate from the estate of B. F. Moulton, deceased, as a family allowance, the sum of two thousand four hundred dollars; and that in the opinion of one of the executors, "there is every reason to believe that there is ample in said estate of B. F. Moulton to pay such family allowance." But this was a matter to be decided by the opinion of the Probate Court, and that Court found, as a fact, that there was no available property to pay the expenses of the last sickness of the deceased, which included the claim of the petitioners.

There is no copy of the will in the transcript. Special legacies are exempted from liability for the payment of debts, "if it shall appear to the Court necessary to carry into effect the intention of the testator, if there shall be other sufficient estate." (Probate Act, Sec. 180.)

Supposing that there was other sufficient estate, we cannot assume error on the part of the Probate Court in adjudging that it was not necessary to exempt the property specially bequeathed in order "to carry into effect the intention of the testator."

Order affirmed.

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Argument for Respondent.

[No. 2,422.]

**E. J. EDWARDS v. W. K. ESTELL, ADMINISTRATOR OF
THE ESTATE OF ALONZO STEWART, DECEASED, MARY N.
STEWART AND ALONZO STEWART.**

COUNTY SURVEYOR.—A County Surveyor is, under the statute, one of the agents of the State for the sale of swamp and overflowed lands.

CONTRACT AGAINST PUBLIC POLICY.—A contract made by a County Surveyor with another person, by which the surveyor is to search out and survey swamp and overflowed land, and assist the other in effecting a purchase of it, and the other is to make the application to purchase, make the first payment of twenty per cent., and one year's interest in advance, and procure a certificate of purchase, and then convey one half to the Surveyor, is void, as against public policy.

SPECIFIC PERFORMANCE OF PAROL CONTRACT.—If a Surveyor and another enter into a parol contract, by which the Surveyor is to search for and survey swamp lands, and the other is to pay the first installment of twenty per cent. purchase-money, and procure a certificate of purchase, and then deed one half to the Surveyor, the services performed by the Surveyor are not such part performance of the contract as to bring the case within the tenth section of the Statute of Frauds, and enable the Court to decree a specific performance.

APPEAL from the District Court, Tenth Judicial District, County of Colusa.

The contract spoken of in the opinion was a parol one. The defendant recovered judgment, and the plaintiff appealed.

The other facts are stated in the opinion.

A. L. Hart and *S. T. Kirk*, for the Appellant, argued that the services of the Surveyor were such a part performance as took the case out of the statute; and cited, 1 Cal. 207; 27 Cal. 119; 22 Cal. 575, and 6 Cal. 149. They also argued that the contract was not against public policy, as the Surveyor did not have to fix the price of the land, and must perform the duties prescribed to him by the statute, and did not act in a fiduciary capacity.

W. C. Belcher and *W. F. Goad*, for the Respondent, argued that the agreement was void because against public policy; and cited, *Callagan v. Hallett*, 1 Caines, 104;

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Mitchell v. Vance, 5 Monroe, 529; *Andrews v. Pratt*, 44 Cal. 309, and *Pickett v. School District No. 1*, etc. 25 Wis. 541. They further argued that there had been no part performance under the tenth section of the Statute of Frauds, and that the Court would not decree a specific performance; and cited, *Clinan v. Cooke*, 1 S. & L. 41; *Johnson v. Glancey*, 4 Blackford 94, and *German v. Machin*, 6 Paige, 288.

By the Court, RHODES, J.:

The plaintiff and Stewart entered into an agreement to the effect that the plaintiff, who was then County Surveyor of Colusa County, would search out and find in that county a quantity of swamp and overflowed land, survey the same, and assist Stewart in effecting a purchase of it from the State; that Stewart would make the affidavit and application to purchase, and make the first payment of twenty per cent., and the first year's interest on the balance; procure a certificate of purchase, and then would convey one half of the land to the plaintiff. The plaintiff searched out and found the land mentioned in the complaint, and surveyed the same, and Stewart, in pursuance of the agreement, made the application to purchase the land; the application was approved, and he paid the first installment of twenty per cent. of the purchase-money and the interest on the balance, according to the agreement; and the certificate of purchase was issued, but it was not issued until after the death of Stewart. The action is brought against the administrator and heirs of Stewart, to compel a specific performance of the agreement to convey the one half of the land.

The Court found, as a conclusion of law, that the agreement was against public policy, and was and is void. The defendants take the further position that the case does not come within the tenth section of the Statute of Frauds — that there was not such a part performance of the agreement as would justify the Court in decreeing its specific performance.

There are several officials who are charged with the performance of duties relating to the sale of the swamp and overflowed lands belonging to the State. It cannot be said

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that there is any one officer whose duty it is to make those sales. The County Surveyor, the Surveyor-General, the County Treasurer, the Register of the State Land Office, and the Governor, severally perform duties respecting such sales. The County Surveyor, in receiving an application to purchase, and making the survey, is no less the agent of the State than the County Treasurer in receiving the purchase-money, or the Surveyor-General in approving the survey, or the State Register in issuing the certificate of purchase. If the question were whether the Governor could issue a patent to himself, or the Surveyor-General approve a survey made for himself, there is no doubt that it would be held that they could not perform those acts, and it is equally clear that the County Surveyor could not receive and file his own application to purchase, and make a survey for himself of the lands mentioned in his application; and that he could not do the same things nominally on the application of another, but really for himself in whole or in part. The agreement in this case was, in effect, that the County Surveyor should receive the application to purchase, make the survey, and perform other official acts required of him by law, for the joint benefit of himself and Stewart. We can see no way to escape the conclusion that the agreement on the part of the plaintiff to perform those official acts nominally for the benefit of Stewart, but really for the joint benefit of himself and Stewart, is contrary to public policy, and therefore void. He being, as before remarked, one of the agents of the State for the sale of the lands, is prohibited, by the highest considerations of public policy, from becoming the purchaser.

It is unnecessary to dwell on the second question at any length, though it, as well as the other question, has been elaborately discussed by counsel. There are two propositions upon which the cases are very fully agreed; first, that the payment of the purchase-money will not be regarded as part performance; and, second, that the acts of part performance must be such that it would be fraud upon him for the other party to refuse performance on his part. (Fry on Specif. Perf. Secs. 388 and 403, and cases cited.)

Points decided.

The term purchase-money, as employed in the proposition above stated, comprehends the consideration, whether it be money or property, or services, for which the lands are to be conveyed, and is not limited to money alone. Here the services to be performed by the plaintiff were the consideration for which the one half of the lands were to be conveyed to him; and hence the performance of those services did not constitute a sufficient part performance, within the meaning of the equitable rule. There is no ground for saying that the plaintiff, by his alleged acts of part performance, has been placed in such a position that the refusal of the defendants to convey the one half of the lands will operate as a fraud upon him. The refusal to convey merely leaves him the creditor of the estate of Stewart, and full compensation may be made for his services in money. He is in no worse position than if, instead of rendering the services, he had advanced their value in money.

Judgment affirmed. Remittitur forthwith.

WALLACE, C. J., concurring specially:

I concur in the judgment upon the first point discussed in the opinion.

[No. 8,640.]

JULIAN OAKS v. JOHN RODGERS.

ORDER OF COURT.—If an order which is required to be made by the Court, is entitled and filed in the Court, and bears the seal of the Court, it will not be considered as an order of the Judge at Chambers, because the words "it appearing to me," are used in it, and the *testatum* clause says "in witness whereof, I have hereunto set my hand."

OATH ADMINISTERED BY THE COURT.—If the statute requires an oath to be administered by the Court or Judge, and it is administered by the Clerk in open Court, under the direction of the Court, and tested by the Clerk, it is administered by the Court in the sense of the statute.

ORDER MAKING A SOLE TRADER.—A certified copy of the order declaring a married woman a sole trader, is admissible in evidence, even if, in the order, the Judge uses the first person, as though it was made by him

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instead of the Court, and the oath attached thereto appears upon its face to have been administered by the Clerk.

APPEAL from the District Court, Fifth Judicial District, Stanislaus County.

The following is the order declaring the defendant a sole trader, and the oath referred to in the opinion:

“WHEREAS, it appearing to me on the application of Mrs. Julian Oaks that she is a married woman and a suitable person to become a sole trader, and one of that class of persons contemplated by the laws of this State; and it further appearing to my satisfaction that due and legal notice of said intended application has been given:

“And it further appearing to me that said application is made in good faith, and for the purpose of supporting herself and minor children, and not with the intention of defrauding the creditors of her husband; and it also appearing that the said husband is reckless and improvident in his expenditures, so much so as to endanger the means of supporting his family.

“And it further appearing that all the moneys said applicant now has using in her said business, that of farming, stock-raising, and transacting business generally are the exclusive products of her own labor, and that no part thereof came to her from her said husband.

“It is therefore ordered, adjudged and decreed, that Mrs. Julian Oaks, the above named applicant, be, and she is hereby, declared to be a sole trader, and as such she be permitted to carry on the business of farming, stock-raising and transacting business generally in Empire Township, Stanislaus County, State of California, in her own name and on her own account; and that all the property, revenues, moneys and credits so invested and ensuing from the profits and proceeds of said business shall belong exclusively to said Julian Oaks, and she shall not be liable for any debts of her said husband, and that she be allowed all the privileges, and held to all the liabilities and be liable to all legal process now or hereafter to be provided by law.

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“ In witness whereof, I have hereunto set my hand, and caused the seal of this Court to be affixed, this 15th day of January, A. D. 1872.

[SEAL.]

S. A. BOOKER,

District Judge, Fifth Judicial District.”

“ Attest: L. B. WALTHALL, Clerk.”

“ STATE OF CALIFORNIA, COUNTY OF STANISLAUS, ss.

“ I, Julian Oaks, in the presence of Almighty God, truly and solemnly swear that this application is made in good faith for the purpose of enabling me to support myself and minor child, not with any view to defraud, delay or hinder any creditor or creditors of my husband, and that of the money so to be used in said business not more than five hundred dollars has come either directly or indirectly from my husband. So help me God.

“ JULIAN OAKS.”

“ Subscribed and sworn to before me, this 10th day of January, 1872.

L. B. WALTHALL,

Clerk.”

The other facts are stated in the opinion.

D. S. Terry, for Appellant, argued that the legal presumption was in favor of the regularity of all proceedings in Courts of Record, and that it having been proved by witnesses that the oath was administered by the Court, the fact that it was attested by the Clerk, was consistent with its having been so administered.

Schell & Scrivner, for the Respondent, argued that the order was not an order of the Court, but purported on its face to be an order of the Judge at Chambers, and that the legal presumption that the proceedings of Courts of Record were regular, applied only to those acts, touching which the Record was silent.

By the Court, CROCKETT, J.:

The plaintiff, a married woman and claiming to be a sole

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trader under the statute, brings this action, to recover the value of certain grain, alleged to have been wrongfully taken from her possession by the defendant. At the trial the plaintiff, in support of the allegation that she is a sole trader, offered in evidence a certified copy of the order of the District Court permitting her to become a sole trader; a copy of which, it appeared, had been duly filed in the Recorder's office. The oath required by the statute to be administered to the applicant, before the order is entered, was indorsed on the recorded copy; but appears to have been administered by the Clerk. On offering the copy in evidence, the plaintiff proved by the oral testimony of two witnesses, apparently without objection, that the oath was administered to her by the Judge in open Court before the order was entered. The defendant objected to the admission of the copy in evidence, on the ground, first; that the order appeared to have been made by the Judge in Chambers, and not by the Court; and, second, that the Clerk had no authority to administer the oath, and it did not appear of record that the requisite oaths had been administered by the Court or Judge. The Court excluded the copy as evidence, and nonsuited the plaintiff; and thereupon a final judgment was entered for the defendant, from which the plaintiff appeals. We think the evidence was improperly excluded. It sufficiently appears that the order was entered by the Court, and not by the Judge at Chambers. It is entitled and filed in the Court, and is under its seal; and though, in drafting the order the Judge employs the phrase "it appearing to me," and, in the *testatum* clause, says, "in witness whereof, I have hereunto set my hand," this does not tend to prove that the order was not made and signed in open Court.

The second section of the statute, as amended in 1862 (Statutes 1862, p. 108,) provides that "before making the order, the Court or Judge shall administer to the applicant the following oath," (giving the form of the oath;) and then provides that a "certified copy of said order, with the said oath indorsed thereon, shall be recorded in the office of the Recorder of the county."

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We think an oath administered by the Clerk in open Court, under its direction, is an oath administered by the "Court" in the sense of the statute; and upon the facts appearing in this record, we will presume it was so done.

Judgment reversed and cause remanded for a new trial Remittitur forthwith.

[No. 2,947.]

WILLIAM POEHLMANN v. E. O. KENNEDY, A. J. SAULMANN, W. T. WALLACE, W. W. STOW AND THE FIREMAN'S FUND INSURANCE COMPANY, AND HENRY L. DAVIS, INTERVENOR.

ASSIGNEE IN INSOLVENCY.—The assignee in insolvency of a person who applies for the benefit of the Act of May 4, 1852, "for the relief of insolvent debtors, and protection of creditors," becomes vested with the title to all the insolvent's property, from and after the surrender, even if it is not mentioned in the schedule, and the assignee does not know of its existence until after the discharge.

EFFECT OF NONSUIT WHERE THERE IS AN INTERVENTION.—If there is an intervenor in an action who claims an interest in the property in dispute, adverse to both the plaintiff and defendant, and the plaintiff answers the intervention, raising material issues, his right to be heard on those issues is not affected by a nonsuit granted on the motion of the defendants.

NONSUIT OF PLAINTIFF DOES NOT DISMISS INTERVENTION.—If there is an intervenor who claims an interest in the matter in dispute, adverse to both plaintiff and defendant, and they answer the intervention raising material issues, and, on motion of the defendant, the Court nonsuits the plaintiff, the action is still pending as to the issues raised on the intervention, and the Court should proceed and try them. The intervention should not be dismissed on the ground that there is no action pending.

MOTION TO DISMISS AN INTERVENTION.—A motion to dismiss an intervention, like a motion for a nonsuit, should point the attention of the Court and of the opposite counsel to the precise ground on which it is made.

APPEAL from the District Court, Fifteenth Judicial District, City and County of San Francisco.

The action was commenced in October, 1868. The plaintiff averred in his complaint that, on the 12th day of May,

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1865, he owned a piece of land, being a portion of one hundred vara lot known on the map of San Francisco as "Lot 270," and that being indebted to A. J. Saulmann, one of the defendants, in the sum of two thousand dollars, with interest, he, on said day, made and delivered to him a deed of the lot, but that the deed was understood and agreed between the parties to be a mortgage to secure the debt. That he paid interest on the debt to March, 1868, when he offered to redeem, but Saulmann refused to permit him to redeem; and that, after the offer, Saulmann conveyed the land to defendant Kennedy, who took the conveyance with full knowledge of the facts, and now claimed to own the land, and refused to allow the plaintiff to redeem. That defendants, Wallace, Stow, and the Fireman's Fund Insurance Company, claimed to have a lien on the land, created by Kennedy, but that it was taken with notice of the facts. The prayer was to be allowed to redeem, and to have the lien of defendants Wallace, Stow and the Insurance Company declared void, as to the plaintiff. Kennedy answered, admitting that the plaintiff owned the land, May 12, 1865, and denying that his deed from Saulmann was a mortgage, or that the plaintiff paid any interest, or was refused the privilege of redemption; and admitting that Saulmann deeded the lot to him, March 25, 1868, for seven thousand six hundred dollars, and denying knowledge or notice that Saulmann's deed was a mortgage. The answer further set up that, May 12, 1865, the plaintiff was insolvent, and made the deed to Saulmann to defraud his creditors; and that, January 20, 1866, the plaintiff commenced proceedings in the County Court of the City and County of San Francisco to be discharged from his debts under the Insolvent Act of this State, and that such proceedings were had, that, March 12, 1866, the plaintiff made an assignment of his property to an assignee, and that the property in controversy, by the assignment, passed to the assignee.

Saulmann answered, denying that his deed was a mortgage, or that the plaintiff offered to redeem, or that he refused to allow him to redeem, and alleging that his conveyance to Kennedy was made with the knowledge and at the

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request of the plaintiff, and that Kennedy had no notice that the deed to him was a mortgage. This answer set up the same facts with regard to the plaintiff's insolvency that were contained in Kennedy's answer.

Henry L. Davis applied for leave to intervene in the action. On this application the Judge of the District Court delivered the following opinion:

“Henry L. Davis seeks to intervene in this action, claiming he holds the fee to the land in controversy, the deed to which the plaintiff executed to the defendant Saulman, he in this action seeks to have declared and adjudged to be a mortgage. The petitioner, Davis, claims to have succeeded to the interest of the plaintiff in the land and premises, by reason of his being defendants' assignee in insolvency. Objection is made to the proposed intervention on the ground that the land and premises are not set forth in plaintiff's schedule in insolvency, it being claimed that an assignment, under our insolvent laws, only transferred to the assignee the assets set forth in the insolvent's schedule. But section thirty-four of the Insolvent Law provides that ‘from and after the surrender of the property of the insolvent debtor, all property of such insolvent debtor shall be fully invested in his assignee or assignees, for the benefit of his creditors’, etc.

Section six hundred and fifty-nine of the Practice Act provides that ‘any person shall be entitled to intervene who has an interest in the matter in litigation in the success of either of the parties to the action, or an interest against both.’ It appears by the proposed verified intervention that Davis has an interest in the matter in litigation, and an interest against both plaintiff and defendants, and is, therefore, entitled to intervene, and his motion made for that purpose is granted.

DWINELLE, Judge.”

In his intervention, Davis set up the proceedings in insolvency as averred in Kennedy's answer, and alleged that he was the assignee, and that there were debts mentioned in the schedule to the amount of four thousand dollars un-

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paid. The intervention then averred the same facts set forth in the complaint, and, in addition thereto, there was an allegation that the plaintiff, in his schedule in insolvency, did not include the land, nor mention any of the facts contained in the complaint, and that the intervenor did not acquire knowledge of these facts until January, 1869. The intervention was filed February 12, 1869.

The plaintiff answered the intervention, admitting the allegation about the insolvent proceedings, but alleging that since his discharge in insolvency he had paid a number of his creditors, and only owed then on his debts about two thousand dollars, and those debts were barred by the Statute of Limitations. This answer also stated that his interest in the lot in controversy was not set forth in the schedule in insolvency, because his attorney misunderstood the nature of his interest in the lot, and thought his sale to Saulmann was a conditional one, with an agreement on the part of Saulmann to re-sell to him. There was a prayer that if the Court decreed a conveyance by Kennedy to the intervenor, that it would also decree that after the payment of the debts remaining unpaid, the intervenor be required to account with and pay over to the plaintiff any surplus remaining, and transfer to the plaintiff any property undisposed of.

Kennedy also answered the intervention denying that the plaintiff assigned to the intervenor the land in dispute. Then followed denials similar to those made to the complaint.

The defendant, Saulmann, also answered the intervention, denying that the lot was assigned to the intervenor, and making similar denials to those found in his answer to the complaint. The prayer to the intervention was similar to the prayer of the complaint, except that the intervenor asked for the same relief to be extended to him, that the plaintiff prayed for.

When the case was called for trial before the Court, without a jury, the plaintiff's attorney made the following opening statement:

"The plaintiff commenced this suit to have a conveyance

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to defendant Saulmann declared to be a mortgage, and to set aside a conveyance from Saulmann to defendant Kennedy, and a mortgage given by Kennedy to the Fireman's Fund Insurance Company, as given and taken with full notice of plaintiff's title, and that the deed to Saulmann was a mortgage.

That defendants answered denying the allegations of the complaint, and setting up as a defense that subsequent to the making of the deed as a mortgage to Saulmann, plaintiff had filed a petition in insolvency in 1866, under the State law, under which such proceedings were had that H. L. Davis had been appointed assignee in insolvency of said plaintiff, and consequently that the cause of action mentioned in the complaint had passed to and vested in the said Davis as assignee.

That said Davis then being informed of these facts, applied to the Court for leave to intervene, which was granted; and a petition of intervention had been filed and served setting up the facts alleged in the complaint as to the alleged mortgage, and also setting up the proceedings in insolvency, his appointment as assignee, and an assignment to him of all the real and personal property of Poehlmann, and asking for himself similar relief to that claimed by the plaintiff.

That the plaintiff answered the petition admitting its allegations, averring payment of part of his debts since his insolvency, and claiming that the value of the property in question in this suit, at the present time, was more than sufficient in amount to pay all his debts remaining unpaid, and asking that the intervenor might be decreed to pay to him any surplus remaining of the proceeds of the property after payment of his debts; and that the defendants, in their answers to the intervention of plaintiff, after repeating their denials contained in their answers to the complaint, set up a denial that the property in question in this suit ever had been assigned to the intervenor.

Counsel further stated the nature of the evidence which would be offered, and by which the allegations of the complaint and intervention would be amply sustained.

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That they should prove that the conveyance by plaintiff to Saulmann was a mortgage made to secure money, to be advanced by him to the extent of two thousand dollars, and that by the testimony of Saulmann himself, as he had already testified in another action, interest had been paid from time to time; that plaintiff had offered to redeem, which Saulmann had refused; that Saulmann had then negotiated a sale to Kennedy, but before its completion he had actual positive notice that Saulmann was only a mortgagee, and the property belonged to Poehlmann; that Poehlmann, while the property stood in Saulmann's name, had always had possession and control of the property, and had made a lease of part of it, which was of record, and of which Kennedy and the other defendants had notice; and that Poehlmann's tenants were occupying the property and paying him rent all the time from the time of the conveyance to Saulmann, and down to and at the time Saulmann transferred to Kennedy; and that the Fireman's Fund Insurance Company loaned money to Kennedy on mortgage of the property, with full knowledge and notice of Poehlmann's ownership and title, and of all the foregoing facts, and that the property now was worth about fifteen thousand dollars."

Thereupon the defendants, by their counsel, upon said opening statement, moved the Court for a nonsuit against the plaintiff, which motion, after argument, the Court granted.

To this order and decision of the Court granting a nonsuit, the plaintiff and the intervenor, by their respective counsel, excepted.

The intervenor then offered evidence for the purpose of proving the allegations alleged in the intervention, to which proof the several defendants, by their counsel, objected, on the ground that there was now no action pending, and therefore there could not be any intervention, and after argument, the Court excluded such proof, and dismissed the intervention, to which decision the intervenor, by his counsel, and the plaintiff, by his counsel, excepted. The plaintiff and the intervenor appealed.

Gray & Brandon and *G. F. & W. H. Sharp*, for the Appellants, argued that in moving for a nonsuit on the opening statement of the plaintiff, the defendants admitted the truth of the statement; and that the statement showed that the defendants fraudulently held the property, and that the intervenor was entitled to all the relief he claimed, and the plaintiff to the surplus after payment of debts; and that, if the plaintiff was not entitled to a judgment, the intervenor was entitled to relief, and should not have been turned out of Court.

W. H. Patterson, for Respondent, argued that the plaintiff had no interest in the property, and that as the nonsuit was properly granted, it left only the intervention and answers thereto; and that, as the intervenor did not offer to redeem, the intervention contained no cause of action; and cited *Bucher v. Conradt*, 3 Kernan, 108, and *Van Schaick v. Winne*, 16 Barb. 89.

By the Court, NILES, J.:

The nonsuit as to the plaintiff, on motion of the defendants, was properly granted. The opening statement of his counsel, taken in connection with the admissions of his verified answer to the intervention, which formed a part of the pleadings in the case, showed that whatever right of property he may have once had in the subject matter of the controversy, had passed to the assignee in solvency, and was vested in him. (Hittell's General Laws, Art. 3,843.) He had, therefore, no cause of action against the defendants, whatever claim he might have had against the intervenor. His right to be heard upon the issues made to the intervention by his answer thereto, was not affected by the nonsuit granted on the motion of defendants.

But we think the Court erred in dismissing the intervention upon the ground that there was no action pending after the nonsuit had been granted. The intervenor was a party to the suit, claiming an interest in the matter in litigation adverse to both plaintiff and defendants. As such party he was entitled to have the issues raised between himself and

Points decided.

each of them tried and determined. This right could not be effected by the dismissal of the plaintiff's action.

It is urged by the respondents that the order of dismissal should not be disturbed, for the reason that the intervention was defective in that it did not offer a redemption or allege the readiness of the intervenor to pay the debt secured.

In reply to this point, it is sufficient to say that this ground was not suggested in the motion made, or in the succeeding order, which went solely upon the ground that after the granting of the nonsuit there was no action pending, and hence there could be no intervention. A motion of this kind, like a motion for a nonsuit, should point the attention of the Court and of the opposite counsel, to the precise grounds upon which it is made. It is very possible that the supposed defect in the pleading, now presented for the first time, might have been obviated in the Court below, if urged there, by a suitable amendment.

For these reasons the judgment must be reversed and the cause remanded for a new trial. So ordered.

Mr. Chief Justice WALLACE did not sit in this case.

[No. 3,694.]

RICHARD GRAY v. WILLIAM COREY.

FRAUDULENT SALE OF PERSONAL PROPERTY.—D. owned several teams, with which he was engaged in hauling bark for G. Drivers were employed, and D. did not personally superintend the work. The teams were fed and kept nights at a barn on G.'s land, and the drivers slept there. G. met D. at a town several miles from the barn, and bought the teams, and, returning toward the barn, met the teams on the road, and told the drivers of his purchase, and requested them to continue work for him, to which they agreed. He went to the barn the same night, and renewed the arrangement with the drivers, who, the next day, continued hauling bark, and were met by an officer, who attached the teams at the suit of a creditor. *Held*, that there was not an actual delivery and continued change of possession as required by the Statute of Frauds.

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APPEAL from the District Court, Twentieth Judicial District, County of Santa Cruz.

Action to recover the possession of two mules and their harness, and two lumber wagons.

The plaintiff was, and for several months prior to the month of October, 1871, had been the owner of certain lands in the county of Santa Cruz, and extensively engaged in the preparation and transportation of oak bark for the purpose of tanning. One Donnellan was, about the first of October, and for many months prior thereto, the owner of several teams of horses, mules, harness and wagons, and engaged in hauling bark for plaintiff from plaintiff's woods, to the tanneries in the vicinity of Santa Cruz. Donnellan was hauling this bark under a contract. He had three teams engaged, each under the charge of a driver. Donnellan himself had but little to do with the active and personal prosecution of this work; but the several teams were managed and worked by their respective drivers. Donnellan, with his family, resided in a house that was upon the land of plaintiff, and upon the same premises, and adjacent to the house occupied by Donnellan and his family, was a corral, and certain sheds and a barn where the horses were kept at night, and in the barn were stored several tons of hay and a small quantity of barley, owned by Donnellan, and from which the teams were fed by the drivers. In the vicinity of this corral the drivers camped when not driving upon the road. For several months prior to the first of October, 1871, this had been the continuous employment, location and position of the parties and property in question.

Upon the 2d of October, 1871, Donnellan being then in failing circumstances, executed to plaintiff a bill of sale of the teams, wagons, hay and grain above described, together with all the paraphernalia used by the men, and about the teams in the transportation of bark. The consideration for this sale was six hundred dollars — one half cash, one half upon a contract then existing between Gray and Donnellan. The bill of sale was signed and delivered

Statement of Facts.

at the town of Santa Cruz, upon the 2d of October, 1871, at about 3 o'clock P. M., of that day. After receiving the bill of sale the plaintiff started out upon the road; a few miles from Santa Cruz he met the teams he had purchased, in charge of Donnellan's drivers, and informed the drivers of Donnellan's situation; that he, Donnellan, had left, and that plaintiff had purchased the property. He proposed to the men to continue in his, plaintiff's employment, as they had done in the employment of Donnellan. The men made no objection, but proceeded to the mills with their loads. That night the men and teams returned to the place where they had camped while in Donnellan's employ. The animals were fed from the same supplies and taken care of by the same men. That evening the plaintiff visited the camp of the teamsters, exhibited his bill of sale from Donnellan, and informed the men of its contents, and renewed more specifically his offer to continue the men in the same position in his own employment. To this proposition the drivers assented.

This, and what occurred during the day when plaintiff met the teams upon the road, are all the acts of plaintiff in connection with the property, after his purchase, and before the seizure hereafter mentioned.

Upon the morning of October 3d, the drivers fed the teams from the same supplies as before, and proceeded to haul bark from the plaintiff's land to the tanneries, proceeding over the same road, each man in charge of the same team, and the whole employment being in every respect precisely the same that it had been while Donnellan was the owner of the property. While thus engaged upon the road upon the 3d of October, 1871, the teams and wagons were attached by the defendant, as constable, upon a process issued from a Justice's Court and at the suit of one Fraser against Donnellan, and as Donnellan's property.

The property, except two horses and two wagons, was returned to plaintiff.

Donnellan's family were residing at the house where the horses were kept and fed, and they continued to reside

Opinion of the Court — McKINSTRY, J.

there until after the attachment. Donnellan himself did not accompany Gray after the bill of sale was given, nor did he that night return home, but remained in town, and upon the morning of the 2d went to San Francisco.

From the 2d of October the drivers were paid for their services by plaintiff, Gray. Plaintiff paid full value for the property.

There was no actual or attempted fraud in the transaction upon the part of the plaintiff and Donnellan, or either of them, other than what the law may presume from the facts above recited.

The Court below held that there was not an actual delivery and a continued change of possession, as required by the Statute of Frauds.

The defendant recovered judgment, and the plaintiff appealed.

Albert Hogan and *J. H. Logan*, for the Appellant, argued that there was a sufficient delivery and change of possession; and cited, *Ford v. Chambers*, 28 Cal. 13; *Lay v. Neville*, 25 Cal. 545; *Godchaux v. Mulford*, 26 Cal. 316; *Jewett v. Warren*, 12 Mass. 300, and *Ricker v. Goss*, 5 N. H. 570.

Heacock & Adams, for the Respondent, argued that there was no delivery or change of possession; and cited, *Dickey v. Davis*, 39 Cal. 567; *Woods v. Bugby*, 29 Cal. 466, and *Whitney v. Stark*, 8 Cal. 514.

By the Court, MCKINSTRY, J.:

The Court below held that there was not an actual or immediate delivery and continued change of possession of the personal property sued for in this action, so as to render the sale valid as against the creditors of Donnellan. We think this conclusion is sustained by the finding of facts.

Judgment affirmed.

Mr. Justice RHODES did not express an opinion.

Argument for Respondent.

[No. 3,457.]

EDWARD O'HALE v. THE CITY OF SACRAMENTO.

LIABILITY OF CITY FOR NEGLIGENCE OF A CONTRACTOR ON A STREET.—When the Act incorporating a city requires sewers to be constructed under contracts to be let by the city, the contractor, in performing the work, is not the agent or servant of the city; and any negligence in performing the work is his negligence, and the city is not liable for injuries sustained through his negligence.

CASE AFFIRMED.—*James v. San Francisco*, 6 Cal. 528.

APPEAL from the District Court of the Sixth Judicial District, Sacramento County.

The plaintiff appealed.

The other facts are stated in the opinion.

Edgerton & Smith, for Appellant.

It was the duty of the defendant to have erected lights and barriers at and around the excavation, and it is liable in damages for injuries resulting from a breach of such duty. (*Mayor and C. C. Baltimore v. Marriott*, 9 Md. R. 160; *Mayor and C. C. Baltimore v. Pennington et al.* 15 Md. R. 12; *Angel on Highways*, Sections 299, 300; *Kimball v. Bath*, 38 Maine R. 219; *Burnham v. City of Boston*, 10 Allen's R. 290; *Hitchcock v. Village of Pittsburg*, 16 N. Y. R. 161; *Milwaukee v. Davis*, 6 Wis. R. p. 377; *City of Buffalo v. Halloway*, 3 Seld. 493; *Magor, etc., v. Furze*, 3 Hill, 612; *Rochester White Lead Company v. City of Rochester*, 3 Comstock, p. 463; *Pittsburgh City v. Gwin*, 10 Harris—22 Penn. St. Rep—54; *Erie City v. Schwingle*, 10 Harris, 384; *Mayor v. Lassen*, 9 Hump. 757; *Delmonico v. Mayor*, 1 Sandf. 222.)

J. H. McKune, for Respondent.

The corporation has no election. It must let the contract, and to the lowest bidder, giving adequate security. It has no funds provided for the construction by itself of such sewers. In such cases the defendant is not liable. (*James v. San Francisco*, 6 Cal. 528; *Reedy v. London and*

Reply to Respondent.

N. W. R. R. Co. 4 Welsh, H. and G. 243.) And a municipal corporation, like a private individual, is not liable for the acts or non-feasance of a contractor. (*Palk v. Mayor of New York*, 8 N. Y. 222; *Blake v. Ferris*, 5th N. Y.—Selden—48; *Gumderr v. Cormack*, 2 E. D. Smith, 254; *Barry v. St. Louis*, 17 Mo. 121; *Walcott v. Swampscott*, 1 Allen, 101; *Boswell v. Laird*, 8 Cal. 469; *Du Pratt v. Lick*, 38 Cal. 691.)

Edgerton and *Harrison*, in reply. There is a broad distinction between the liability for injuries that may result from a work itself, which is necessarily dangerous, however skillfully performed, and that which ensues from the negligence of an employee of an independent contractor, in the performance of the work. In the latter case, the contractor is alone liable as the immediate superior; while in the former, a municipal corporation causing the work to be done, without taking proper precaution against accident, is the ultimate superior, and liable to the party injured. We concede that the case of *James v. San Francisco*, 6 Cal., is squarely against us on this point. But the distinction upon which we here insist, and the ground upon which we seek to make the defendant responsible, do not seem to have been at all attended to by the Court in that case. Since it was decided, the precise point in hand has been elaborately discussed by elementary authors, and repeatedly adjudicated by Courts of Last Resort in other States; and the liability of a municipal corporation on the ground stated may be said to be an established principle in American Jurisprudence. We assert with entire confidence that the decision in *James v. San Francisco*, cannot be sustained upon principle; that it is in direct conflict with an overwhelming weight of authority, and should be unhesitatingly overruled. (Cooley's Constitutional Limitations, page 249; Dillon on Municipal Corporations, Sections 791, 792, 793; *Storrs v. City of Utica*, 17 N. Y. 104; *The City of Buffalo v. Holloway*, 3 Sel. 493; *City of Springfield v. La Claire*, 42 Ill. 476; *Chicago City v. Robbins*, 2 Black. 418; *City of St. Paul v. Louis Seitz*, 3 Minn. 297; *City of Detroit v. Corey*, 9 Mich. 165; *Blake v. St. Louis*, 40 Mo. 569; *Hutson v. Mayor, etc.* 9 N. Y. 163.

Opinion of the Court — Rhodes, J.

By the Court, RHODES, J.:

A sewer was being constructed in one of the streets of Sacramento by Fuller, under a contract entered into by and between him and the city; and in the prosecution of the work, he had made an excavation which extended a part of the way across K street. The excavation was left by him, at night, without any light or barrier to warn travelers of the existence of the excavation, except a slight barrier at the southern end of the excavation. The plaintiff, while riding along K street, was precipitated into the excavation and sustained serious personal injuries. The Court ordered a nonsuit.

The question as to the liability of the city for injuries sustained under circumstances like those shown by the record in this case, is not new in this Court. The Act of March 21, 1868 (Stats. 1867-8, p. 221), requires the sewers to be constructed under contracts to be let, as therein provided. The contractor, in performing the work, is not the agent or servant of the city; and any negligence in the performance of the work, is his negligence, and not that of the city; and the city is not liable for injuries occasioned by such negligence. Such is the rule laid down in *James v. San Francisco*, 6 Cal. 528. The same rule is applied in cases where both parties to the contract are private persons. (*Boswell v. Laird*, 8 Cal. 469; *Du Pratt v. Lick*, 38 Cal. 691.) The rule ought not now to be disturbed, except for the most cogent reasons; and we are not satisfied that the better reasons sustain the opposite rule.

Judgment and order affirmed.

Mr. Chief Justice WALLACE did not express an opinion.

Argument for Appellant.

[No. 3,171.]

GUADALUPA GARCIA DE RUBIDOEX, ADMINISTRATRIX OF THE ESTATE OF LOUIS RUBIDOEX, DECEASED v. ARTHUR PARKS.

PRINCIPAL AND AGENT.—The relations between an attorney-in-fact, who undertakes to care for and protect the land of his principal, and negotiate sales of the same, and the principal, are of a fiduciary nature, and the agent must not put himself, during his agency, in a position which is adverse to that of the principal.

IDEM.—Agents, from the nature of their employment, are subject to the rule which governs the relation of trustee and *cestui que trust*, and an act of the agent with respect to the subject-matter of the agency, injurious to the principal, may be avoided by the principal, as between themselves.

DEALINGS BETWEEN PRINCIPAL AND AGENT.—The agent and principal are not absolutely prohibited from dealing with each other in respect to the subject-matter of the agency or trust; but, in all their dealings with each other, the utmost good faith is required, and the burden of proof is on the agent to show affirmatively that he acted in good faith, fairly and honestly.

APPEAL from the District Court, Seventeenth Judicial District, County of San Bernardino.

On the 16th day of March, 1867, Louis Rubidoex, the deceased, made the power of attorney mentioned in the opinion, and he departed this life on the 24th day of September, 1868. On the 18th day of September, 1868, Rubidoex, and his wife, the plaintiff here, executed to the defendant a deed of one undivided one fourth of the Rancho Gurupa, in consideration of his services as attorney in fact already performed, and to be continued at long as Rubidoex should live. The other facts are stated in the opinion.

V. E. Howard and H. C. Rolfe, for the Appellant.

Parks was employed to sell as well as to manage. He was, therefore, a trustee as well as agent. (Story on Agency, Sec. 246; Bonv. Dic. Trust.) See the answer, folio 28, as to the agency to sell. It is a settled rule that the trustee or agent to sell cannot himself become the purchaser, either

Argument for Appellant.

directly or indirectly, not even at public auction. The purchase is presumed injurious to the beneficiary. (Hilliard's Vendors, p. 384, Sec. 2; 4 Kent, 438; *Torry v. Bank of Orleans*, 9 Paige 648, 662; *Copeland v. Insurance Co.*, 6 Pic. 203.) The *cestui que trust* is entitled to have the sale set aside, without showing any actual injury. (1 Story's Eq., Sec. 322; Hilliard on Vendors, pp. 384, 388, 855; *Campbell v. Walker*, 5 Vesey, 680; 3 Vesey, 740.) When it is a mere agency, and not a technical trust, the purchase is regarded with great jealousy. (Story's Eq. Secs. 318, 316; Tiffany and Bullard, p. 553.) It cannot stand if there is any inadequacy of price, or improper influence. (Story's Eq., Secs. 321, 322; 2 Selden, 268.) There must be the utmost good faith when the agent purchases the subject of the agency. (Story's Eq. Secs. 315, 316, *a.*) The law presumes superiority and influence on the part of the agent or trustee. (Story's Eq. Sec. 329, *a.*) The evidence in this case does not rebut the presumption. The agent cannot deal with the subject for his own benefit. (*Hardenberg v. Bacon*, 33 Cal. 377; 29 Cal. 146; Story's Eq. Sec. 210; Story's Agency, 559; Story's Eq. Secs. 308 to 328; *Pryn v. Saltus*, 18 How. P. Rep. 518.) In this case the power was coupled with an interest.

The burden of proof is on the trustee or agent in cases where he can purchase to show that it is fair. (1 Story's Eq. Sec. 310, and especially Sec. 311 and note; Spencer's Eq. p. 943.) In this case inadequacy of consideration was combined with unsoundness of mind and improper influence. (Hilliard's Vendors, 370, 366, 367; *Harvey v. Sullen*, 46 M. 147.) There was also oppression. (Hilliard, p. 371.)

It is apparent from the whole testimony, that Rubidoex and his family were overreached in the transaction. The case shows the wisdom and justice of the rule, which permits the beneficiary to have the conveyance set aside at his election, if he applies within a reasonable time. (Story on Agency, Secs. 9, 210, 211; *Wormly v. Wormly*, 8 Wheat. 421; Story on Contracts, Sec. 298; Story's Eq. Secs. 322, 323.)

Henry M. Willis, for Respondent.

Opinion of the Court — Crockett, J.

An attorney in fact, even under an unlimited power, is not a trustee. In order to set aside a deed obtained by an attorney from his client, damage to the client must not only be alleged, but it must be proven. (*Kisling v. Shaw*, 83 Cal. 425.) The findings support the judgment, and the testimony was conflicting, so that the Court will not disturb the judgment.

By the Court, CROCKETT, J.:

In March, 1867, Don Louis Rubidoex, being the owner of a rancho in San Bernardino County, made and delivered to the defendant a power of attorney, which recites that on account of his "general debility and ill health," he had constituted and appointed the defendant his attorney, for him and in his name, to take possession of and have the charge and control of all his real estate in that county, to commence and prosecute any actions which he might deem necessary, and to appear and defend actions, "and generally to do and perform all matters and things, transact all business, make, execute and acknowledge all contracts, orders and writings (except the signing of deeds of conveyance,) assurances and instruments, which may be requisite or proper to effectuate all or any of the premises, or any other matter or thing belonging to me, with the same powers, and to all intents and purposes with the same validity, as I could if personally present." When the power was made, Rubidoex was an old man, in feeble health, and for several years had been rendered almost helpless by a personal injury he had received, and had become so addicted to the excessive use of opium and intoxicating drinks, as greatly to impair his mind. Indeed, the testimony shows conclusively that at the date of the power, and from thence until his death, he was subject to paroxysms, produced by the use of opium and other stimulants, which rendered him, for the time being, completely imbecile, and greatly impaired the vigor of his intellect generally. In February, 1868, whilst the power of attorney was in force, and the defendant was acting under it, Rubidoex conveyed to him an undivided fourth part of the rancho then remaining unsold.

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The only consideration recited in the deed is stated in these words: "That for and in consideration of the services of the said party of the second part, as attorney in fact of said Louis Rubidoex, Sr., duly performed, and being performed, the value thereof is duly acknowledged, said parties of the first part hereby give, grant, bargain, sell," etc. It is not pretended that there was any other consideration for the deed than the services rendered and to be rendered by the defendant under the power of attorney. The plaintiff is the widow of Rubidoex and the administratrix of his estate; and the action is brought to set aside the deed on the ground of the trust relations between Rubidoex and the defendant, and that it was obtained by fraud, imposition and undue influence; and on the further ground that Rubidoex had not sufficient mental capacity to enter into a valid contract. The judgment in the Court below was for the defendant, and the plaintiff appeals.

Among other facts, the Court found "that at the execution of said deed of one fourth of said rancho, the said Rubidoex was of sound understanding, and knew the nature and object of the deed." But that, for years prior to that time, Rubidoex had been a confirmed invalid, and that his intellect had been greatly impaired by disease and by the excessive use of opium and alcoholic drinks, was established by the uncontradicted testimony of a number of witnesses. There was, it is true, some evidence tending to show that, on the particular occasion when the deed was executed, he appeared to comprehend the terms of the instrument, and had sufficient intellect remaining to understand the nature of the transaction; but so far as we can judge from the record, the weight of the evidence was overwhelmingly to the contrary.

But, however this may be, it is admitted by the answer, that at the date of the deed the defendant was acting under the power of attorney, and the relation of principal and agent existed between the parties. It is further admitted that the defendant was then the attorney in fact of Rubidoex "to look after, care for and protect the interests, and negotiate sales of the property of the said Louis Rubidoex, Sr.,

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deceased." While thus undertaking to care for and protect the interests of Rubidoex, and to negotiate sales of his property, he becomes himself the purchaser of one fourth of a valuable property. The relations between them were of a fiduciary nature; and in such cases the law exacts from the agent the utmost good faith and fairness in all dealings between them relating to the subject-matter of the agency. It may be regarded as a prevailing principle of the law that an agent must not put himself, during his agency, in a position which is adverse to that of his principal. For even if the honesty of the agent is unquestioned, and if his impartiality between his own interest and his principal's might be relied upon yet the principal has, in fact, bargained for the exercise of all the skill, ability and industry of the agent, and he is entitled to demand the exercise of all this in his own favor." (1 Parsons on Contracts, 74, 75; Hilliard on Vendors, 384; Story on Agency, Section 246.)

After stating the rule, "that any act of an agent with respect to the subject-matter of the agency, injurious to his principal, may be avoided by the principal," as between themselves; as for example, if an agent to sell become the purchaser, Mr. Hilliard, in his work on Vendors (page 386), proceeds to say that the confidential relations between the principal and agent, and the *cestui que trust* and the trustee, "are to some extent identical; all agents being in a certain sense trustees, and all trustees agents;" and that "agents, from the very nature of their employment, standing in a confidential capacity, are clearly subject to the rule" which governs the relation of trustee and *cestui que trust*. The parties occupying these relations are not absolutely prohibited from dealing with each other with respect to the subject-matter of the agency or trust; but, in all cases of purchases and bargains respecting property directly and openly made between principals and agents, the utmost good faith is required. The agent must conceal no facts within his knowledge which might influence the judgment of his principal, as to the price or value; and if he does, the sale will be set aside. The question, in all such cases, does not turn upon the point whether there is any intention to

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cheat or not, but upon the obligation, from the fiduciary relation of the parties, to make a frank and full disclosure." (1 Story's Eq. Sec. 316, *a.*) In such cases, "the law presumes the existence of that superiority and influence on the one part, and that confidence and dependence on the other, which is the natural result of the relation, and will accordingly decree the cancelation of the contract, unless it appear affirmatively to have been equal and just." (1 Story's Eq. Sec. 329, *a.*) The burden of proof is on the agent to show, affirmatively, that he acted fairly and in good faith, and without concealment, and that the price paid was fair and just. (1 Story's Eq. Sec. 311.) The defendant, in this case, has failed to bring himself within these rules. Waiving the question whether Rubidoex had sufficient capacity to contract, it is admitted that he was an old man, greatly enfeebled by disease and by the excessive use of stimulants. In dealing with him in respect to his estate, it was incumbent on the defendant to disclose to him fully all the information he had acquired as to its present or prospective value, which might tend to enlighten him as to the propriety of selling on the terms proposed. It is not alleged or proved, nor does the Court find that any such disclosure was made. The Court, it is true, finds (contrary, as we think, to the weight of the evidence), that Rubidoex was of sound understanding, and knew the nature and object of the deed, and "that no fraud nor device was used by said defendant, or any other person in his behalf to obtain the execution of said deed, and the value of the land therein deeded was not an unreasonable consideration for the services rendered and to be rendered by him." But this is not enough to uphold a transaction of this character between a decrepid, feeble old man and his confidential agent, who is averred in the complaint to have obtained "an entire ascendancy over the mind" of his principal; an averment which is not denied in the answer. There is nothing in the findings or proofs to rebut the inference that the deed may have resulted from this undue influence. Moreover the finding as to the fairness and sufficiency of the consideration is not satisfactory. The value of the land

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conveyed may not have been an unreasonable consideration for the services rendered "and to be rendered." But that is not the proper test. From this the contract does not "appear affirmatively to have been equal and just." On the contrary, it would seem to be unequal and unjust, and in every respect injudicious for a feeble old man to convey one quarter of his estate to his agent as a compensation for services not then rendered, and which might never be rendered. In every aspect in which we can view the case, we think this transaction ought not to stand.

Judgment reversed, and cause remanded for a new trial.

[No. 3,459.]

F. KRAUSE v. THE CITY OF SACRAMENTO.

COMPLAINT AGAINST CITY FOR NEGLIGENCE OF STREET CONTRACTOR.—When the charter of a city requires work in the improvement of streets to be done by contract, or by the owners of adjacent lots, and an action is brought against the city for an injury sustained by negligence in the work on such improvements, an averment in the complaint, that the work was being done at the instance of the city, will be construed as alleging that the work was being done as the charter directed.

LIABILITY OF CITY FOR DAMAGES.—When the charter of a city requires work in improving streets to be done by contract, or by the owners of adjacent lots, the city is not liable for damages sustained by reason of the negligence of the contractor, or owner of adjacent lots, in performing such work.

APPEAL from the District Court of the Sixth Judicial District, County of Sacramento.

The plaintiff appealed.

The other facts are stated in the opinion.

Edgerton & Smith, for Appellant.

McKune & Welty, for Respondent.

By the Court, RHODES, J.:

It is alleged in the complaint that a certain sidewalk was

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being constructed in said city "at the instance of defendant;" that it was being constructed on a grade of about eight feet above the old sidewalk; that while it was being so constructed, it was suffered by the defendant to be left in such a condition that at the end thereof, there was an abrupt declivity of about eight feet; that the defendant suffered it to be left without any lights or barriers; and that the plaintiff, in traveling along said sidewalk, in the night, was precipitated from the end of said sidewalk, and thereby suffered great bodily injuries, etc. The demurrer to the complaint was sustained.

It is not expressly alleged that the city was itself doing the work mentioned, but only that it was being done at the instance of the defendant. The Charter of 1863 (Stats. 1863, p. 433, Sec. 52 and following) does not provide for such work being done directly by the city; but the provisions are, so far as we have noticed, that work in the improvements of streets is to be done by contract, except in certain cases where the Street Commissioner requires it to be done by the owners of the adjacent lots. If the work was being done by a contractor, or the owners of adjacent lots — and in view of the provisions of the charter, the complaint must be construed as averring that the work was being done in one of those modes — the negligence charged in the complaint was not that of the city, but of the contractor or lot owners; and under the rule in *O'Hale v. Sacramento*, ante p. 212, and cases there cited, the city is not liable for the injuries sustained by the plaintiff.

Judgment affirmed.

[No. 3,599.]

SAMUEL BURRELL v. ROBERT A. HAW.

SUIT IN EQUITY TO HAVE A PRE-EMPTION PATENTEE DECLARED A TRUSTER.—

In a case where two parties are contesting pre-emption claimants before the United States Land officers, and the land is awarded to one and the patent issued to him, and the other then files a bill in equity to have

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the Court adjudge the patentee his trustee, and compel him to make a conveyance of the legal title, the plaintiff must show, first; that he possessed all the necessary qualifications of a pre-emptor, for without these qualifications he has no standing in Court; second, that the defendant did not possess those qualifications, and that the land officers, in deciding that he did, were imposed on and deceived by fraudulent practices and false testimony used before them, and procured by the defendant.

IDEM.—The Courts will not pass on the sufficiency of the evidence upon which the decision of the land officers was based in such case, but, it must be shown that their decision was induced by fraudulent practices of the defendant, whereby the plaintiff was deprived of his right to pre-empt.

IDEM.—In such case, the fact that the patentee was not a citizen, and swore falsely on that point in his declaratory statement, is not sufficient to show fraudulent practices on his part on the question of citizenship; but it must appear that he produced witnesses who swore falsely on that point, and thereby deceived the land officers.

APPEAL from the District Court of the Eighth Judicial District, Humboldt County.

Special issues were submitted to the jury who returned their findings thereon. The Court below, on these findings, rendered judgment for the defendant; the plaintiff moved for a new trial, which was denied, and he then appealed from the judgment and from the order denying the motion for a new trial. (A report of this case on a former appeal will be found in the 40 Cal. 373.) The other facts are stated in the opinion of Judge HAYNES, of the District Court, which is indorsed in the opinion of the Supreme Court, and is as follows:

“The parties to this action were contestants before the United States Land office at Humboldt, as to the right of pre-emption to the east half of the southeast quarter of section No. 20, in township No. 4 north, of range No. 1 west, from Humboldt meridian.

“After a protracted contest of about six years, conducted before the proper tribunals of the Land Department, the land was finally awarded to defendant, and in due time a United States patent was issued to him for the same.

“Plaintiff brings this action against defendant, and alleges that he possessed all the qualifications, and performed all the acts required by law, to entitle him to pre-empt said lands, and that he proved the same by competent testimony,

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at the several trials had in the land office, and that by right in law and in equity, the patent should have issued to him; that the same would have so issued but for certain false and fraudulent representations made by defendant at the several trials had, whereby the officers of the Land Department were imposed upon and deceived, and thereby induced to award the land to defendant.

“It is alleged that defendant, in his declaratory statement, falsely and fraudulently represented himself to be a citizen of the United States, and produced and procured false testimony to that fact, at the trials had, when in fact he was not a citizen, and had not filed his declaration of intention to become a citizen, which he well knew.

“And it is further alleged that defendant, in an affidavit made by him on the 6th day of July, 1865, and filed in the Land Office, fraudulently represented that he had settled upon and improved said lands, in good faith, for his own use and benefit, and not for the purpose of speculation, and that he had not made any agreement or contract with any person, whereby the title he might obtain from the government, should inure to the benefit of any person except himself, when in fact defendant did, in 1858, for a valuable consideration, sell and convey said lands to one James Clark, and it was understood and agreed between the parties, from the time of sale and up to and including the date of said affidavit, that the title which defendant should acquire, should inure in whole to the benefit of, and be vested in the said Clark.

“That by reason of the false and fraudulent representations of defendant concerning his citizenship, his good faith to appropriate the lands to his own use, and his sale to Clark, all of which were made with the intent to deceive and mislead the officers of the Land Department, the said officers were in fact mislead and deceived, and caused to be issued to defendant a patent, dated September 15, 1866.

“Plaintiff asks the decree of this Court, that defendant holds the patent to said lands and the title by it in him vested, in trust for plaintiff, and that he convey the same to plaintiff by good and sufficient conveyance.

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“The answer denies all the material allegations of the complaint, and for further answer, sets up the trial and decision or judgment of the Register and Receiver of the Land Office at Humboldt, and the affirmance of that judgment by the Commissioner of the General Land Office at Washington, and the Secretary of the Interior, whereby the patent was awarded to defendant; and that at said trial so had the matters charged in the complaint as fraudulent upon the part of defendant, were at issue and the subject of inquiry, and were decided adversely to plaintiff.

“To enable the plaintiff to obtain the relief he seeks in this action, it is necessary for him to show that he possessed all the qualifications, performed all the acts, and complied with all the conditions required by law to entitle him to preëempt, and that he proved these facts by competent testimony at the trial in the Land Office.

“He must further show that the officers of the Land Department, before whom the trial was had, were imposed upon and deceived by the misrepresentations and fraudulent practices of defendant, and thereby induced to render a decision in his favor, and against plaintiff. In the language of our Supreme Court: ‘There can be no doubt that the decision of the officers of the Land Office upon the questions arising as to such qualifications, is binding upon the parties, unless some question of fraud or trust intervenes.’

“We are not permitted here, to pass upon the sufficiency of the testimony upon which their decision is based, although it may appear to be unsatisfactory and wholly insufficient to warrant the final conclusion reached; yet we cannot interfere with their decision, unless it is shown by the testimony that such decision was induced by the fraudulent practices of defendant, whereby plaintiff was deprived of his right to preëempt, being otherwise qualified.

“Special issues have been submitted to the jury, and they have found the facts. The general question for consideration now is whether the facts found are sufficient to entitle the plaintiff to the relief asked.

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“The most material questions involved in the issues are:

“1st. As to the citizenship of defendant; and, 2d, as to the sale to Clark.

“The jury, answering to the seventh, eighth and ninth issues, submitted by plaintiff, find in substance:

“That defendant, at the time of making application to enter said lands, was not a citizen of the United States, and knew himself to be an alien, and that he falsely and fraudulently represented himself to be a citizen in his declaratory statement to preëempt said lands, and also at the trial before the officers of the United States Land Office. This question of defendant's citizenship was a very material question to be determined by the officers of the Land Office, and from testimony before them they found he was a citizen. Were they induced to make such findings, by reason of any false testimony or other fraudulent practice imposed upon them by defendant? If not, then their decision upon that question is conclusive of citizenship. Defendant had to prove citizenship to the satisfaction of the Land Officers before he could preëempt. He was not, could not be a witness in his own behalf, consequently was compelled to prove that fact by competent witnesses.

“Did any witness swear falsely upon this matter? The jury answering to the tenth issue submitted by defendant, say that ‘they have no positive evidence that defendant procured or produced any witness who swore falsely before or at the trial before the land officers.’ Any representation or allegation that defendant himself might have made, in his declaratory statement or otherwise, touching his citizenship, could not have influenced the tribunal, because it was not testimony. In the absence, then, of any fact showing that defendant proved his citizenship by false testimony, we must accept the decision of the Land Officers, upon that question, as conclusive.

“It is true that the jury here find that defendant was not a citizen, and I am of opinion that their finding is in accordance with the evidence, yet the testimony on that point being conflicting, other persons or tribunals might have arrived at different conclusions. The officers of the Land

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Office, with precisely the same evidence before them, or even with less, might have concluded that defendant was a citizen. At all events, upon the evidence before them, much or little, they have so decided, and the facts shown will not warrant the Court in interfering with that decision.


“The next question presented is in reference to the alleged sale to Clark.

“The findings of the jury upon this issue are apparently inconsistent. Answering the tenth, eleventh and twelfth issues submitted by plaintiff, they say in substance that in 1858, defendant sold and conveyed the land in controversy to Jas. Clark. That on the 6th day of July, 1865, there was an agreement or understanding between defendant and Clark that the title which defendant might acquire should inure to and be vested in Clark. That the affidavit made by defendant before the Register on the 6th day of July, 1865, stating that he had not made any agreement or contract by which the title he might acquire should inure to the benefit of any person but himself, was not true.

“Answering the eleventh and twelfth issues submitted by defendant, they say the agreement to sell was never consummated, and that the same was canceled or destroyed by mutual consent of parties. The time of the destruction or cancellation of the agreement is not shown; if it had been, perhaps the apparent conflict in the findings might have been harmonized.

“But the jury further find that the matter of the sale to Clark was a question in issue before the land officers, and passed upon by them. That being the case, I think the facts found are insufficient to justify the Court in interfering with their decision upon that point. All of these facts were before them, and they doubtless found that no sale was consummated or intended.

“There is yet another question involved in the issues submitted, material to the determination of the case, to wit: the question of the inhabitancy or residence of plaintiff upon the land in controversy. The Supreme Court say: ‘Plaintiff must show all the conditions necessary to enable



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him to preëempt before he can call in question the proceedings through which defendant obtained his patent.'

"Inhabitancy, a *bona fide* residence upon the land, is one of the indispensable conditions to be complied with by a party seeking to preëempt. This fact must be established to the satisfaction of the proper officers of the Land Office. If the applicant fail in this point alone, it is fatal to his claim; and however fraudulent may have been the conduct of his contesting adversary, he is not in a condition to attack the proceeding. The jury find that at the several trials had before the proper officers of the United States Land Office, it was decided that plaintiff had failed to show a *bona fide* residence upon the land, and for that reason was not entitled to preëempt. There being no allegation of fraudulent practice by defendant in this connection, and no pretense that the officers were deceived and misled on that question, their decision is conclusive.

"In conclusion, it appearing from the testimony and the finding of the jury that at the several trials had between plaintiff and defendant before the United States Land Officers touching their respective rights to preëempt the land in controversy, all the facts charged in the complaint as fraud, were in issue and passed upon by such officers; and it further appearing that no false testimony was procured or produced by defendant, at such trial, by which the officers were deceived, or misled, it follows that the decision there rendered by the Land Department is binding upon the parties, and conclusive of their rights.

"It is the opinion of the Court that the facts found are insufficient to entitle the plaintiff to the relief which he seeks."

George Cadwalader, for the Appellant, argued that the fact that the defendant falsely swore that he was a citizen, in his declaratory statement, established fraudulent practices on his part to procure the patent, and showed that the Land Officers were deceived; and cited, *Cunningham v. Ashley*, 14 How. U. S. 377; *Barnard v. Ashley*, 18 Id. 43; *Garland v. Winn*, 20 Id. 6; *Minnesota v. Bachelder*, 1 Wallace 109, and *Johnson v. Towsley*, 13 Wallace 72.

S. M. Buck and *G. W. Spaulding*, for Respondent, argued

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that the Court would not review the judgment of the Land Officers on question of fact, since the passage of the Act of 1841; and cited, *Semple v. Hagar*, 27 Cal. 170; *Ableman v. Booth*, 21 How. U. S. 506; *Quinn v. Kenyon*, 38 Cal. 504; *Lindsey v. Hawes*, 2 Black, 558, and *Miles v. Caldwell*, 2 Wallace, 39.

They also argued that the declaratory statement was not evidence; and cited, *Hemphill v. Davies*, 38 Cal. 579.

By the Court, McKINSTRY, J.:

For the reasons set forth in the opinion of the learned Judge of the District Court, the judgment and order denying new trial herein are affirmed.

[No. 3,799.]

WM. A. HOWARD v. THE CONTINENTAL LIFE INSURANCE COMPANY.

LIFE INSURANCE POLICY.—A life insurance policy which provides for the payment of an annual premium on the 31st day of October, during the continuance of the policy, or for the payment of the same, with the consent of the company, half yearly, or quarter yearly, or thrice yearly in advance, one third of which may be endorsed as a loan, does not, if the assured elects, with the consent of the company, to make payments thrice yearly, and makes the first, extend him credit for the second and third payments to the end of the year. He must make the second and third payments when they fall due.

IDEM.—A clause in such policy that the company, upon proof of death, shall pay the sum insured, "any balance of the years' premium when not all paid at the commencement of the year, or any indebtedness to the company on account of this policy being first deducted therefrom," does not have the effect of extending such credit.

IDEM.—The company is authorized to deduct any instalment not due at the death, but is not compelled to pay the sum insured, with the right to deduct an instalment overdue when death occurs.

On the 31st of October, 1867, the defendant insured the life of Benjamin C. Howard, for the term of five years, and for the sum of five thousand dollars. The following are

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the material parts of the policy which have reference to the question here involved:

“This policy witnesseth: That the Continental Life Insurance Company, in consideration of the representations made to them in the application for this policy, and of the sum of two hundred and sixty-seven dollars and twenty-one cents, to them in hand paid by Benjamin C. Howard, and of the sum of two hundred and sixty-seven dollars and twenty-one cents, to be paid on or before the last day of February and June next, and of all loans and interest made upon this policy at any time, and of the annual premium of twelve hundred and two dollars and forty-five cents, to be paid on or before the thirty-first day of October in every year, during the continuance of this policy, or within thirty days after the several payments as above shall be due and payable (or with consent of the Company, half or quarter, or thrice yearly in advance, with interest), one third of which may be indorsed as a loan; do assure the life of Benjamin C. Howard, of San Francisco, in the County of San Francisco, State of California, for the sole use of Benjamin C. Howard, in the amount of five thousand dollars, for the term of five years, from the date of this policy, or until his decease, or, in case of his death, before that time; and the said Company do hereby warrant and agree to and with the said assured, well and truly to pay, or cause to be paid, the said sum insured to the said assured, within ninety days after the said Benjamin C. Howard shall have been insured for five years, as aforesaid; or, in case he shall die before that time, then to the legal representatives of the said assured, within ninety days after due notice and satisfactory evidence of his death during the continuance of this policy, and proof of the just claims of the assured under the same; any balance of the year's premium, (when not all paid at the commencement of the year,) or any indebtedness to the Company, on account of this policy, being first deducted therefrom.”

The assured elected, with the consent of the company, to make thrice yearly payments, and, on the 31st day of Octo-

Argument for Appellant.

ber, 1869, paid one third of the yearly premium, but failed to make the payment due on the last day of February, 1870. On the 21st day of April, 1870, the sum due on the last day of the February previous was tendered by Howard, but the Company declined to receive it. On the 9th day of October, 1869, the assured assigned the policy to the plaintiff. The assured died on the 6th day of May, 1870, and this action was brought to recover the sum insured by the policy.

The defense set up by the company was that, before the death of the assured, to wit: On the last day of February, 1870, there became due and payable as premium on the policy, the sum of two hundred and sixty-seven dollars and twenty-one cents, which had not been paid or tendered on said last day of February, or within thirty days thereafter, whereby the policy became null and void.

The Court below instructed the jury that, by a proper construction of the policy, if the assured elected, with the consent of the company, to make half yearly, or thrice yearly payments, that then, upon making the first payment of any year, a credit was extended to him for the other payments of that year, until the end of the year; and that if he died during the year, the company were entitled to deduct from the amount insured the unpaid payments of the year. The jury, under the instructions of the Court, found a verdict for the plaintiff.

The defendant appealed.

The other facts are stated in the opinion.

George A. Nourse, for the Appellant, argued that the language of the policy was so plain that construction was unnecessary, and that the company was to pay the insurance within ninety days after the death of the insured, but in making such payment, might deduct therefrom any balance of the current year's premium when the whole of it was not paid at the beginning of the year; and that if the insured died after making the first payment of a year, the installments for the remainder of the year must be deducted, and that the indebtedness of the company spoken of in the policy could only exist by virtue of the loan of one third of

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the year's premium provided for in the policy, and that unpaid installments not due under the policy could not be treated as indebtedness under the policy. He argued that this construction of the policy was just, equitable and indispensable to the carrying on of business by the defendant. That the assured was not, by the terms of the policy compellable to pay one dollar of premium, and the company could not maintain an action against him for any portion of it; and that if the policy were to remain in force, even if no premium were paid thereunder (except the trifling amount paid as a preliminary to the issuance of the policy) it was difficult to see what adequate consideration the company received for its promise to pay the amount insured, when the insured should die. No company could long do business on such a basis. In order to pay its losses, it must certainly collect premiums. He cited *Pitt v. Berkshire Life Insurance Co.*, 100 Mass. 500.

Van Dyke & Loewy, for the Respondent, argued that the loan of one third of the year's premium negatived the right of forfeiture, and that in providing for a division of the annual premiums, the company nullified the forfeiture clause; and that the words, "any balance of the year's premium," referred to the premium actually to be paid in installments, and that the words, "any indebtedness," referred to the loan of one third of the premium.

They also argued that forfeitures were odious in law, and that an interpretation which created a forfeiture was not to be favored; and cited, *Jackson v. Topping*, 1 Wend. 388, and *Coleman v. Clements*, 23 Cal. 248.

By the Court, MCKINSTRY, J.:

After stating "in consideration of representations," etc., the policy proceeds: "And of the annual premium of, etc., to be paid on or before the 31st day of October in every year during the continuance of this policy, or within thirty days after the payments as above shall be due and payable (or with the consent of the company, half, or quarter, or thrice yearly in advance, with interest,) one third of which may be indorsed as a loan, do assure," etc.

The learned counsel for respondent treat the provisions

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of the policy as extending a credit for the second and third installments to the end of the year. It must be admitted that this does not accord with the portion of the instrument above quoted. The assured elected to make thrice-yearly payments, and by the plain language of the contract the second and third installments became due in four and eight months after the first, if he should live throughout the year.

It is said, however, the construction claimed must be adopted in order to give effect to the stipulation that the insurers should pay—within ninety days after proof of the death, etc.—the sum insured “any balance of the year’s premium (when not all paid at the commencement of the year,) or any indebtedness to the company on account of this policy being first deducted therefrom.”

It is urged that to hold the assured bound—under pain of forfeiture—to pay the second and third installments as agreed, would make the contract unilateral; that as the company, by the clause above recited, has secured to itself the whole year’s premium on the death of the assured, it would be a violation of the principle of mutuality to declare the policy forfeited, by reason of a failure, on the part of the assured, to pay a balance, the payment of which is made certain by the terms of the contract; that it is impossible there can be a balance due of the whole annual premium, without a reciprocal liability of the company for the entire year.

The clause as to deducting any indebtedness on account of the policy is satisfied by reference to the circumstance that one third of each year’s premium could be indorsed as a loan. We agree that it was intended—in case of the death of the assured before one or both of the postponed installments would have become due, had he continued to live—that the company should deduct, from the amount insured, the balance unpaid of the year’s premium. But we do not think that, as a consequence of this right reserved by the insurers, the assured was relieved of the necessity of paying any installment when it was agreed it should be paid. The company was authorized to deduct any install-

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ment not due at the death, but was not compelled to pay the sum insured, with the right to deduct an installment overdue when death occurred. Thus construing the several clauses, effect is given to all the stipulations of the contract; but to sustain the view of respondent it would be necessary to ignore the portion of the policy which fixes the thrice-yearly payments, making the policy read that the payments should be made one third at the commencement, and two thirds at the end of the year.

Primarily, the whole of the annual premium was payable in advance. Passing the other incidents, the consideration for the policy was the payment of the whole of this premium; if it was not paid, the policy was to lapse. But the assured had the option—the company consenting—to pay thrice-yearly in advance. In the first case there was to be no obligation to pay the sum insured, unless the whole premium was paid; in the second, no such obligation unless each thrice-yearly payment was made as it became due. In both cases the company was entitled to receive the whole annual premium as the consideration for insurance during the year. Such was the contract, and we see nothing inequitable in its terms. The subtraction of the installment, which would not have been due if the assured had continued to live, was the only way in which the company could be placed in a like position, with respect to the assured, to that they occupied with respect to others who had paid the whole of the annual premium in advance.

Judgment and order denying a new trial reversed, and cause remanded for a new trial.

Mr. Justice RHODES did not express an opinion.

[No. 4,205.]

SARAH A. POWELL v. JAS. N. POWELL, IVORY
T. NASON, J. D. LAUGENOR, ROBERT ROBERTS
AND G. F. GUSHAW.

JOINDER OF DEFENDANTS IN ACTION ON BONDS.—When an administrator, in the course of proceedings on the estate, gives two bonds, one when let-

Argument for Appellant.

ters are issued, and the other when real estate is about to be sold, and the condition of each of the two bonds is the same, and the burden of the sureties in each is the same, the sureties on the two bonds, in an action on them, may be made joint defendants in the same action.

LIABILITY AMONG SURETIES TO CONTRIBUTION.—When an administrator gives two bonds, one when letters are issued, and the other when real estate is about to be sold, and each bond contains the same condition, and the sureties assume a common burden, they are liable to contribution *inter sese*.

APPEAL from the District Court of the Sixth Judicial District, County of Yolo.

The action was brought upon two bonds of the defendant, J. N. Powell, as executor of the estate of G. W. Powell, deceased, against him as principal, and his co-defendants as sureties. One of the bonds was given when the letters testamentary were issued to him, and Dale and Gushaw were sureties on this, and the other was given subsequently, pursuant to an order to sell certain real estate; and defendants Nason, Laugenor and Roberts were sureties on this. Both bonds were conditioned that the defendant Powell should, as executor, faithfully execute the duties of his trust, according to law. The defendant, Powell was removed from the office of executor, and the plaintiff was appointed administratrix of the estate, with the will annexed; and the said defendant, having been ordered by a decree of the Probate Court to pay over certain moneys in his hands belonging to the estate, and having failed to do so, this action was brought against the sureties on both bonds to recover the amount. Each set of sureties demurred separately that the other sureties had been improperly joined as defendants in the action, and that two causes of action had been improperly united. The demurrers were sustained, and judgment having been rendered for the defendants, the plaintiff appealed.

J. C. Ball and Armstrong & Hinkson, for Appellant, cited *Deering v. Earl of Winchelsea*, 1 Lead. O. in E. 96; 2 Hit. Art. 5, 771, Sec. 73; *Irwin v. Backus*, 25 Cal. 214; *Murdock v. Brooks*, 38 Cal. 601; *McNabb v. Wixom*, 7 Nev. 173; Code Civil Pro. 383.)

Points decided.

James Johnson and *R. C. Clark*, argued that section three hundred and eighty-three of the Code of Civil Procedure, did not apply to persons severally liable upon separate instruments, but to those liable upon the same writing only, and that the cause of action, if it occurred by reason of non-accounting for the personal property, affected only the parties who executed the first bond; but if it arose by reason of non-accounting for the proceeds of the sale of the real estate, it affected only the sureties who signed the second bond.

By the COURT:

The condition of each of the two bonds by the executor is identical; the burden of the sureties the same, and their consequent liability *inter sese* to contribution clear. The complaint, therefore, though proceeding upon both bonds, was not open to the objection that several causes of action had been improperly united. Nor was there a misjoinder of parties defendant. The sureties who are sued, as observed already, though executing separate bonds, assumed a common burden, and as being sureties on separate instruments, may be properly joined as co-defendants in the action. (Code Civil Proc. Sec. 383.)

The judgment is reversed and cause remanded, with directions to overrule the demurrers of the defendants.

[No. 10,079.]

THE PEOPLE v. AH WEE.

PROOF OF A CONVERSATION HELD IN TWO LANGUAGES.—A conversation between a person indicted for murder, and his victim, while alive, held partly in Chinese and partly in English, may be proved, that part of it held in English by persons present who understood English only, and that part of it held in Chinese by persons present who understood Chinese, provided that both the accused and his victim understood both languages.

NUMBER OF COUNSEL IN CRIMINAL CASE.—In a capital criminal case, the Court may, in its discretion, allow more than two counsel to address the jury, either on behalf of the people or the defendant.

Opinion of the Court — NILES, J.

FAILURE TO ASK AN INSTRUCTION TO THE JURY.—A defendant, in a criminal case, cannot complain that the Court did not instruct the jury upon a point in issue, unless he asked an instruction on the point, and it was refused.

APPEAL from the District Court, Sixth Judicial District, County of Sacramento.

The defendant was indicted jointly with Ah Wee and Ah Moy, for having murdered Ah Quong, at the city of Sacramento, on the 1st day of March, 1873.

Ah Quong was shot and also injured with a hatchet, and was immediately carried into a room. Ah Quong and Ah Wee were Chinamen. After Ah Quong had been carried into the room, and when he was at the point of death, several white persons came into the room, and several Chinamen, among whom was Ah Wee. Ah Wee and Ah Quong could speak English. One of the witnesses, a white man, asked Ah Quong in English who shot him. Ah Quong answered in English that Ah Wee shot him. This fact was proved by white men who did not understand Chinese. A short time after this declaration of Ah Quong, made in the presence of Ah Wee, Ah Wee spoke in Chinese. A Chinaman who was present and understood Chinese well, and a little of English, was called as a witness, and stated that Ah Wee said when he spoke in Chinese, "I am not Ah Wee." The Court permitted the testimony to be given under the objection of the defendant.

The other facts are stated in the opinion.

Jo. Hamilton and J. C. Goods, for the Appellant.

Attorney-General Love and S. Solon Holl, for the People.

By the Court, NILES, J.:

The defendant, having been indicted for the crime of murder, and convicted of murder in the second degree, appeals from the judgment and from the order overruling his motion for a new trial. The bill of exceptions presents many points, of which we shall consider only those urged by the counsel for the defendant in their brief.

Opinion of the Court — Niles, J.

1. The evidence of the declaration of the deceased, Ah Quong, made in the presence and hearing of the defendant, and of the defendant's reply, was properly admitted. Both were Chinamen, and both understood the English language. The declaration of the deceased, that Ah Wee shot him, was made in English, and in reply to a question addressed to him in that language, and was testified to by several bystanders. The answer of the defendant that he was "not Ah Wee," was given in Chinese, and was testified to by a Chinaman who understood both languages. It is evident that the admission of this testimony was not liable to the dangers suggested in the case of *People v. Gelabert* (39 Cal. 664). In that case the confession of the prisoner was made in a language which the witness did not understand sufficiently to enable him to testify to all that was said, and the part not understood might have explained the apparent contradictions of his declarations as testified to. But here the evidence sufficiently showed that the deceased and the defendant understood each other, and that the declarations of each were correctly and fully stated, although by different witnesses.

2. At the close of the testimony the Court, against the objection of the defendant, permitted three counsel for the prosecution to address the jury. The defendant had but two counsel, who each addressed the jury. No objection is made to the order of the several arguments, but it is urged that it was error to allow more than two arguments upon the part of the People. Section one thousand and ninety-five of the Penal Code provides that "if the indictment be for an offense punishable with death, two counsel on each side may argue the cause to the jury. If it is for any other offense, the Court may, in its discretion, restrict the argument to one counsel on each side." As we construe this section, its object was to give to both the prosecution and the defense, in a capital case, the right to have the case presented to the jury by at least two counsel; and to distinguish the case in this respect from the inferior grades of crime in which the argument may, in the discretion of the Court, be restricted to one counsel on each side. But it

Points decided.

was not intended to limit the power of the Court in any criminal case to allow as many counsel as in its discretion should seem proper, to address the jury, whether upon the part of the people or of the defendant.

3. It is claimed that the Court erred in its charge in omitting to instruct the jury in reference to the law of manslaughter. The entire evidence is not before us, and there is nothing in the evidence presented tending to show that such an instruction would have been applicable. Moreover, a specific instruction upon this point should have been asked by the counsel for the defendant, if they deemed it appropriate. (*People v. Haun*, 44 Cal. 100.)

4. We do not deem it necessary to review in detail the several instructions asked by the counsel for the defendant and refused by the Court. We discover in none of them any principle of law, correct in itself, and applicable to the case, that is not as well, and usually better, stated in other instructions asked and given.

Judgment and order affirmed.

[No. 7,928.]

MOSES SPRAGUE v. THOMAS EDWARDS, J. S. HARBISON, JOHN A. BURKE, LEONARD HOYT, FRANK JUISTO, DOMINGO ROCCO AND GIOVANI SACCONI.

LEGAL EFFECT OF A DEED.—The legal effect of a deed will be determined from the instrument itself, construed in the light of surrounding circumstances.

CONSTRUCTION OF TRUST DEED.—A deed conveying land to a trustee who has no beneficial interest, with power to sell and lease, will be most strongly construed against the trustee, and most favorably to the beneficiary under the trust.

CONVEYANCE OF TRUST LAND BY TRUSTEE.—When a conveyance is made to a trustee, who has no interest in the trust fund, with power to sell and convey the trust lands, subject to the approval of the *cestui que trust*, the deed of the trustee to a purchaser will not pass the legal title without the approval of the *cestui que trust* in writing.

Statement of Facts.

INSERTION OF WRONG WORD IN CONTRACT.—When it is apparent upon the inspection of a contract that, by a clerical error, a wrong word has been inserted, it will be read, in an action at law, as though the right word was in its place, and resort need not be had to a Court of equity for a reformation of the instrument.

APPEAL from the District Court, Sixth Judicial District, County of Sacramento.

Ejectment to recover a tract of land in the county of Sacramento, described as “commencing on the east bank of the Sacramento river, where Main street, in the town of Sutterville, would strike said bank, being the southwest corner of a tract of land conveyed by John A. Sutter to L. W. Hastings; running thence easterly along said south line of said Hastings’ tract one mile; thence at right angles southerly one half mile; thence at right angles westerly to the Sacramento river; thence up and along the Sacramento river to the place of beginning.”

The following was the deed from Robinson and others to Saunders, which is construed in the opinion:

“This indenture, made this twenty-third day of June, A. D. one thousand eight hundred and fifty-five, between Henry E. Robinson, Eugene F. Gillespie, John S. Fowler, John McDougal and Wake Brierly, of the counties of Sacramento and San Francisco, State of California, parties of the first part; Lewis Saunders, Jr., of the County of Sacramento, of the second part, and John A. Sutter, of the County of Sutter, State aforesaid, party of the third part: Whereas, on the 1st day of July, 1850, John A. Sutter and Ann, his wife, executed to said E. Robinson, Eugene F. Gillespie, John S. Fowler, and John McDougal, a deed of conveyance, dated that day, for a certain tract of land bounded as follows: Commencing on the east bank of the Sacramento river, in latitude thirty-nine degrees, forty-one minutes, forty-five seconds, and running thence on said parallel of latitude to the Rio de los Plumas, Feather river; thence down said Feather river with its meanderings to its junction with Sacramento river; thence up and along the east bank of said Sacramento river to the place of beginning:

Statement of Facts.

also, whatever right, title, interest they may have in and to any other tract or parcel of land whereto they might have or be possessed of in the State of California, as will more fully and at large appear from the said deed, which is recorded in the office of the Recorder of Sutter County, in Book of Deeds —, pages —; and whereas the said Eugene F. Gillespie has purchased and acquired all the right, title, interest and estate of the said John S. Fowler, and the said Wake Brierly has purchased and acquired all the right, title and interest, and estate of the said John McDougal in and to said tracts or parcels of land; and whereas, the said deed or conveyance, certain covenants and conditions are to be kept and performed on the part of said Robinson, Fowler, Gillespie and McDougal, as parties of the second part therein, a more full statement and enumeration of which may be had by reference to said deed or conveyance, recorded as aforesaid; and whereas, differences and controversies have arisen and exist under the said deed, which differences and controversies it is the mutual desire of the parties hereto to end and determine, and it is the further desire of the parties hereto to become seized and possessed of certain ascertained and deferred rights, titles, interests and estates in the tract or parcel of land herein first above particularly described; now, therefore, this indenture witnesseth: That the said parties of the first part, for and in consideration of the sum of one dollar to them in hand paid, the receipt whereof is hereby acknowledged, and also the consideration of a certain deed of conveyance bearing date even herewith, executed by the said Sutter, and Ann, his wife, and P. L. Edwards, to Eugene F. Gillespie, Henry E. Robinson and Wake Brierly, of and for the undivided seventy-four one hundredths ($\frac{74}{100}$) equal parts of all their rights, title, and interest and estate in and to all of the said tract or parcels of land herein first above particularly set forth and described, except the reservations hereinafter stated, and for the further consideration of the final adjustment and compromise of all the differences and controversies aforesaid, and of the release made in said deed from said Sutter and wife, and P. L.

Statement of Facts.

Edwards to said Robinson, Gillespie and Brierly, of the said Robinson, Gillespie, Fowler, McDougal and Brierly, and each of them, their heirs, executors, administrators and assigns, of and from all further fulfillment or performance of any and all acts, covenants, and conditions, and things whatsoever, which were to be by them fulfilled, done, or performed under or in conformity with the said deed of July 1, A. D. 1850, stated either by way of rental or otherwise, have bargained, sold, remised, released, and forever quitclaimed, and these presents do bargain, sell, release, and forever quitclaim the undivided twenty-six one hundredths ($\frac{26}{100}$) equal parts of all their rights, titles, interests, estate, claims, and demands of and in all the said tract or parcel of land hereinafter particularly described and set forth, to wit: Commencing on the north of the three peaks, or what is commonly known as the Sutter's Buttes, at a point on the east bank of the Sacramento river, known in latitude thirty-nine degrees, fifty-one minutes, forty-five seconds; thence running with the parallel of said latitude to the Rio de los Plumas, or Feather river; thence down and along the meanderings of the Rio de los Plumas, or Feather river, to its junction with the Sacramento river; thence up and along the east bank of said Sacramento river to the place or point of beginning—excepting and reserving therefrom, and from the operations of this conveyance, the tract of land known as the "Hock Farm," and that known as the "Yuba City Tract," and also such tracts or pieces of land heretofore sold and conveyed or contracted to be sold and conveyed by said Robinson, Fowler, Gillespie and McDougal, and also all the right, title, estate, claim, and demand whatsoever, which the said parties of the first part have, hold, or claim, either in possession or expectancy, of, in, and to any and all other tracts or parcels of land lying and being situate in the State of California, of and in which the said parties of the first part may have become interested, possessed, seized, or entitled under or in virtue of the said deed from the said Sutter, and Ann, his wife, to said Robinson, Gillespie, Fowler and McDougal, bearing date July 1, A. D. 1850; to have and to hold said

Statement of Facts.

lands and real estate, and all the right, title, estate, claim, and demand therein of the said parties of the first part hereby bargained, sold, remised, released, and quitclaimed unto the said party of the second part, his successors and assigns, in trust to and for the several uses, interests, and purposes hereinafter mentioned, namely: First — In trust, to lease the same or any part thereof and to take, collect, and receive the rents, issues, and profits thereof; to sell and convey the same or any part thereof to such person or persons, and for such price or sum of money as to him shall seem meet; subject, however, to the appeal of said John A. Sutter. Second — In trust, to apply the rents, issues and profits thereof and proceeds of the sales aforesaid: 1st. To the payment of the taxes and assessments and legal charges thereon; 2d. To the care, protection and preservation thereof, and to the prosecution of such suits and actions as may become necessary or proper in relation thereto, and to the defense of such suits or actions as may be brought in relation thereto against the said John A. Sutter or those claiming under him, or in any way prejudicial to the right, title, estate hereby bargained, sold, remised, released and quitclaimed; 3d. To pay any just debts against the said John A. Sutter; 4th. To pay over the residue of such rents, profits, and proceeds of sales to the said John A. Sutter, his heirs and assigns, to his and their use and benefits. And the party of the second part covenants to faithfully fulfill and perform the trusts herein created.

“ In witness whereof, the said parties of the first part, and the said parties of the second part, have hereunto set their hands and seals, the day and year first above written.

“ HENRY E. ROBINSON, [L. S.]
JOHN S. FOWLER, [L. S.]
EUGENE F. GILLESPIE, [L. S.]
JOHN McDUGAL, [L. S.]
WAKE BRIERLY, [L. S.]
LEWIS SAUNDERS, JR. [L. S.] ”

The defendants claimed under Sutter, but not through Saunders.

Argument for Respondent.

The plaintiff recovered judgment in the Court below, and the defendant appealed.

The other facts are stated in the opinion.

Beatty & Denson, for the Appellants, argued that there was no evidence that the legal title to the demanded premises, passed to Saunders; that the terms of the trust were, that Saunders should lease the lands collect the rents, sell the land subject to the appeal (doubtless a clerical error for approval) of John A. Sutter, and apply the proceeds to the payment of taxes, preservation of the land, payment of Sutter's debts, and lastly, pay the residuum to Sutter himself; that having them, on the lands derived from Robinson and others, a mere naked trust, which he could not legally transfer to another, and no right to sell this land, except subject to the approval of Sutter, and then only for Sutter's benefit, the conveyance to Tevis would be held not to affect the trust estate; that the deed was a lawful instrument, conveying what he had a right to convey, to wit: his own individual interest in lands, and not affecting the trust property, which, of course, could only be sold for Sutter's benefit, and with his approval; that if intended to convey the trust property, it could not take effect on that property in the face of the restriction that sales thereof must be made subject to the approval of Sutter; that if Sutter had to approve the sale, it should have been shown by lawful evidence that he had approved the transfer to Tevis, before it could become operative, and that no proof of this kind being offered, the deed should have been excluded, or being admitted it proved nothing.

M. Bergin, also for the Appellants, argued that from the recitals in the deed to Saunders, it was evident that it was made to protect Sutter's interests in the property, and to enable him to prevent future sales from being made without his consent.

H. P. Barbour, also for the Appellant, made the same point.

A. P. Catlin, for the Respondent, argued that the deed of

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L. Saunders, Jr., to Lloyd Tevis conveyed the legal title to the demanded premises, and cited, *Johnson v. Fleet*, 12 Wend. 602; 2 Crabb on Real Prop., p. 390, note 1, and authorities there cited. That the deed of Robinson and others to Saunders contained no restriction upon the power of Saunders to sell and convey. The deed itself did not provide for the approval of Sutter, and the word "approval" could not be arbitrarily substituted for "appeal," contained in the deed; and cited, *Hagler v. Simpson*, 1 Busbee, N. C. 384; and that even if the word "approval" had been used, a conveyance could not be approved until made; and in the absence of proof of disapproval, the approval would be presumed; and cited 12 Wend. 671, 676; and that in this action such an objection could not be made; and cited *Lessees of Bayard v. Colfax et al.*, 4 Wash. Reports C. O. U. S. 38, 42.

R. C. Clark & A. P. Catlin, also for Respondent, argued that as the appellants did not claim under Saunders, they could not call him to account for his acts as trustee, nor attack his deed collaterally; and cited, *Winans v. Christy*, 4 Cal. 70; *Milton v. Palmer*, 39 Cal. 458; *Broadstreet v. Clark*, 12 Wend. 602; *Schenck v. Ellingwood*, 3 Edward Ch. 175, and *Brown v. Lipscomb*, 9 Porter, 472.

They also argued, that the Court could not substitute "approval" for "appeal" and cited 2 Parsons on Cont. 496; *Hagler v. Simpson*, 1 Busbee N. C. 384.

By the Court, CROCKETT, J.:

The demanded premises are included within the grant of June 18, 1841, from the Mexican Government to John A. Sutter, and which has been finally confirmed, located and patented. The plaintiff's chain of title consists: First, of a deed from Sutter and wife to Robinson and others, dated July 1, 1850; second, a deed from Robinson and others to Saunders, dated June 23, 1855; third, a deed from Saunders to Tevis, dated July 23, 1864; fourth a deed from Tevis to the plaintiff, dated July 3, 1869. I shall assume for the purposes of this decision (without,

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however, expressing any opinion on the point), that the deeds from Sutter and wife to Robinson and others, and from the latter to Saunders, were effectual in law to vest in Saunders the legal title to the land in controversy; and that the deed from Tevis to the plaintiff conveyed to the latter whatever title Tevis acquired under the deed from Saunders. The remaining inquiry on this branch of the case is, whether the deed from Saunders to Tevis was operative in law to vest in him the legal title to the demanded premises; for the legal title only is in issue in this action. The plaintiff counts upon a title in fee, and the answers do not set up any equitable defense whatever, and put in issue the legal title only. The legal effect of the deed from Saunders to Tevis must be determined by the instrument itself, construed in the light of the surrounding circumstances. The deed from Sutter and wife to Robinson and others, after reciting Sutter's title to the large tract situate between the Sacramento and Feather rivers, also recites that his possession had been invaded by numerous persons who deny his right and title to the possession, and that these unlawful acts have caused him great annoyance. Under these circumstances he conveys the whole tract, with certain reservations, together with all the other lands in the State to which he and his wife were entitled, to Robinson and others, who on their part undertook at their own expense to protect his title and possession, and to pay over to him one sixth part of all the proceeds of sales of the land. The deed from Robinson and others recites that differences and controversies had arisen between themselves and Sutter in respect to the manner in which they had performed their covenants contained in the deed from Sutter and wife, of July 1, 1850, and that for the purpose of ending these controversies it had been mutually agreed that they would convey to Saunders, in trust for Sutter, twenty-six-one-hundredths of the tract situate between the Sacramento and Feather rivers, and also the whole of all the other lands conveyed to them by Sutter and wife, excepting, however, from the conveyance such lands as had been sold and conveyed by

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Robinson and others. Sutter, on his part, agreed to release his claim or title to seventy-four one-hundredths of the tract situate between the Sacramento and Feather rivers, with certain reservations, and also to release Robinson and others from a further performance of their covenants. These facts appear on the face of the conveyances. The deed to Saunders recite a nominal consideration of one dollar only, and is made upon the express trust that Saunders will rent, lease or sell the lands conveyed to him and receive the proceeds thereof, out of which he shall pay: First, the taxes, assessments and charges upon the land; second, the expense of maintaining and defending actions concerning the land; third, any debts that may be due and owing from Sutter to any person whatever; fourth, the remainder, if any, to be paid to Sutter. That clause of the deed which authorizes Saunders to sell and convey the land concludes in these words: "Subject, however, to the appeal of the said John A. Sutter." It is contended on behalf of the defendants that the word "appeal" in this sentence is evidently a mere clerical error for the word "approval;" that the error is manifest from the face of the deed itself, and that the instrument should be read as if the word "approval" were substituted for "appeal." Upon this reading of the deed they claim that Sutter's approval of all sales and conveyances to be made by Saunders was a condition precedent, without the performance of which Saunders had no power to sell or convey. On the other hand, the plaintiff insists that the word "appeal" as here used is meaningless, and must be disregarded; that the Court has no power to substitute another word or sentence for a meaningless phrase employed in the instrument; but that, even though Sutter's consent be deemed a condition precedent, his consent will be presumed after so great a lapse of time. In general, doubtful clauses in a deed are construed most strongly against the grantor, and as favorably to the grantee as the language will permit. The same rule holds good as between a trustee of an express trust, having no interest in the trust fund, and the *cestui que trust*. In such cases doubtful clauses in the

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instrument creating the trust, are construed strictly as against the trustee acting under a power, and most favorably to the beneficiary under the trust. In this case Saunders paid nothing for the property, and had no interest in the trust fund, there being no provision in the deed even for his compensation as trustee. He held the title for the exclusive benefit of Sutter, who was the only real party in interest under the deed to Saunders as his trustee. As between Sutter and Saunders, the powers of the latter are to be strictly construed, and in performing the trust he could not transcend the authority conferred upon him. In construing the phrase, "subject, however, to the 'appeal' of the said John A. Sutter," we must look to the circumstances under which it was inserted in the deed, and must give some effect to it, if practicable. When it is remembered that in the deed to Robinson and others, Sutter had conferred upon them somewhat similar powers in respect to the management and disposition of his large landed estate, and that serious controversies had arisen in respect to the manner in which they had performed their trust, the presumption is strong that in selecting a new trustee to manage and dispose of his estate, he would impose upon him such restrictions as would prevent an abuse of his powers. That the words already quoted were inserted for that express purpose, and were intended to limit and qualify the power of the trustee over the estate, can admit of no reasonable doubt. Following, as they do, immediately after the power of sale conferred upon the trustee, they were obviously intended to limit his absolute power of disposition, and to render it necessary that Sutter's consent should be had before his whole estate was disposed of. It is true the word "appeal" is not the most apt word that could have [been] selected to express this meaning, and I have but little doubt, that through a mere clerical error, it was inserted by mistake for the word "approval." But whether this word was used through inadvertence, or from an ignorance of the proper meaning of the word, it is apparent, I think, not less from the context than from the previous recitals in the deed and all the circumstances sur-

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rounding the transaction, that the word "appeal," as here used, was intended to be synonymous with "approval." It is not the practice of Courts of Justice to divest persons of their estates by a rigid adherence to the rules of grammatical construction, or by a strict interpretation of the language of an instrument, when the sense in which the words were used is apparent from other portions of the instrument, viewed in the light of the attending facts. The sole object to be attained in the construction of contracts is to ascertain the real intention of the parties; and with this view the whole contract and all its provisions, together with the relations of the parties towards each other, will be considered; and effect will be given to the intent thus ascertained, however clumsily the instrument may be worded, and however grossly it may violate the strict rules of grammatical construction. (*Racouillat v. Sansevain*, 32 Cal. 376; *Hancock v. Watson*, 18 Cal. 137; *McNeil v. Shirley*, 33 Cal. 202; *Saunders v. Clark*, 29 Cal. 299; *Brannan v. Mesick*, 10 Cal. 105, 106.) Tested by the rules of construction adopted in these cases, there can be no doubt, I think, that the approval of Sutter was a condition precedent to the exercise of the power of sale and conveyance conferred upon Saunders, and that the latter had no power to sell or convey the land without the previous consent of Sutter. His consent must be affirmatively shown, and will not be presumed. (Hill on Trustees, 4th Am. Ed. 747, and cases cited; *Simpson v. Hornsby*, Prec. Ch. 474; *Barber v. Cary*, 1 Kernan, 397; *Greenham v. Gibbenson*, 10 Bing. 363; *Wright v. Wakeford*, 17 Ves. 454; *Warburton v. Farn*, 16 Sim. 625.) There being no proof in this cause, that Sutter has at any time consented to or approved of the conveyance to Tevis, the deed from Saunders was inoperative to convey the title which he held in trust; and the plaintiff therefore acquired no title under his deed from Tevis.

Judgment reversed and cause remanded for a new trial.

The foregoing opinion was delivered at the January term, 1872, and a rehearing having been granted, the following opinion was delivered at the April term, 1874.

Points decided.

By the Court, RHODES, J.:

Assuming that the deed of Robinson and others to Saunders, conveyed to the latter the legal title to the premises, the question presented for consideration, is whether the legal title passed by the deed of Saunders to Tevis. This involves the construction of the clause in the deed of Robinson and others to Saunders, to the effect that the latter was thereby empowered to sell and convey the lands, "subject, however, to the appeal of said John A. Sutter." The opinion heretofore delivered on that question will stand as the opinion of the Court. The word "appeal," was inserted, we think, by a clerical error, for the word "approval," and will be so read in an action at law, and resort need not be had to a Court of equity, for a reformation of the instrument in that respect. The deed of Saunders to Tevis, without the approval of Sutter, would not pass the legal title to the lands. The approval of Sutter must be shown, and as the title would not pass without such approval, the approval must be in writing.

Judgment and order reversed, and cause remanded for a new trial. Remittitur forthwith.

Mr. Justice McKINSTRY did not express an opinion.

[No. 10,080.]

THE PEOPLE v. INDIAN PETER.

ARREST OF JUDGMENT IN CRIMINAL CASE.—If a committing magistrate, before whom an examination is about to be held, with the assent and concurrence of the district attorney, promises a person under arrest, that if he will become a witness for the people, against other persons then under arrest for the same offense, he shall be acquitted, and the defendant, induced by such promise, testifies and implicates himself, and is afterwards indicted, these facts do not furnish ground for a motion in arrest of a judgment of conviction.

IDEM.—The only grounds on which a motion in arrest of judgment in a criminal case can be based, are those mentioned in the statute.

DISCHARGE OF PRISONER WHEN ON TRIAL.—A promise of immunity from

Opinion of the Court — Wallace, C. J.

punishment, made by a prosecuting attorney, or a committing magistrate, to a person charged with a crime, if he will become a witness for the people against others charged with the same crime, furnishes no ground for discharging the prisoner from prosecution, when on trial. **IDEM.**—The discharge of a prisoner, that he may be a witness against others, must be made at the trial, before the defendant has gone into his defense, by the Court of its own motion, or upon the application of the district attorney.

IDEM.—A defendant, in a criminal case, cannot be discharged from the indictment, without a trial, except in the case provided for by the statute.

APPEAL from the District Court of Eighth Judicial District, Humboldt County.

The facts are stated in the opinion.

Chamberlain & DeHaven and *James Hanna*, for Appellant, cited Bishop's Crim. Proc., Sec. 508, note 1; *People v. Whipple*, 9 Cowen, 715, and *Commonwealth v. Knapp*, 10 Pick. 484.

Attorney-General Love, for Respondents, argued that the matter must be determined by the Penal Code.

By the Court, WALLACE, C. J.:

The defendant was indicted for the crime of murder, and, being put upon his trial, moved the Court to direct his discharge, and in support of the motion read to the Court the following stipulation of facts, signed by the District Attorney: "Defendant was arrested on said charge (the charge upon which the indictment proceeds) and taken before a committing magistrate, without counsel or knowledge of his rights. He was, by said magistrate, informed and made to believe that if he would become a witness for the people against two persons charged with the same offense, to wit: *The People v. John Benoist*, and *The People v. Frank Page*, the defendant would thereby be acquitted of any crime therein, and that not a hair of his head should be harmed. The District Attorney, with knowledge of that fact, used defendant as a witness for the People in said two cases. That in said cases the defendant fully testified for the People, at the request of the District Attorney, and in

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said testimony implicated himself. That he thereby destroyed the value of his testimony, and effectually shut out any defense he might have had to such charge." The motion was denied, and the defendant excepted to the ruling of the Court. The trial thereupon proceeded, and a verdict of guilty of murder in the second degree having been returned, the defendant moved in arrest of judgment, relying in support of the motion upon the stipulation and the fact therein set forth. The motion in arrest being denied, this appeal is brought, and the counsel for the prisoner expressly waives all errors in the record, if any, except such as arise upon the denial of the motion to discharge and the motion in arrest of judgment.

1. It is settled here, that the only grounds upon which a motion in arrest of judgment can be supported are those which are enumerated in the statute; that is, upon certain defects appearing in the indictment upon which the verdict is found. (Penal Code, Sec. 1,004; Id. Sec. 1,185.) The motion in arrest not being based upon any one of the enumerated grounds, was properly denied.

2. Nor was there any error in denying the motion of the prisoner, made during the progress of the trial, that he be discharged from further prosecution. The understanding had between the committing magistrate and the prisoner, and the acquiescence of the District Attorney therein, furnish in themselves no reason, in point of mere law, for the dismissal of proceedings against the prisoner. Those officers had no authority to promise the accused a pardon, or, what is the same thing, immunity from punishment, if he would testify against the others. The English practice of admitting accomplices to give evidence against their associates, under an implied promise of pardon, on condition of their disclosing the whole truth, had reference to persons already under indictment, as well as in custody. It was done only upon motion of the prosecutor made to the Court, and in the exercise of a high judicial discretion.

But, with us, the proceeding is regulated by statute, which provides, that when two or more persons are included in the same indictment, the Court may, at any time before the

Points decided.

defendants have gone into their defense, on the application of the District Attorney, direct any defendant to be discharged from the indictment, that he may be a witness for the people, and that the order of discharge shall be a bar to another prosecution for the same offense. (Penal Code, Sec. 1,099; Id. 1,101.) So, upon its own motion, or upon the application of the District Attorney, the Court may, in furtherance of justice, order an action or indictment to be dismissed — the reasons of such dismissal being entered of record (Id. 1,385); and such order is a bar to another prosecution for the same offense, if it be a misdemeanor, but not a bar if it be a felony, (Id. 1,387).

The statute having thus designated the cases in which, and the proceedings by which, an indictment may be dismissed and a discharge awarded the accused without actual trial, must be taken to exclude all other cases, or cases not provided for by its terms.

It results that the judgment must be affirmed, and it is so ordered.

[No. 10,074.]

THE PEOPLE v. JOHN BROWN.

TRANSCRIPT IN CRIMINAL CASE.—A statement of the evidence in a criminal case, which is not a part of the bill of exceptions certified by the judge, will not be taken into consideration by the Appellate Court.

CHALLENGE TO THE PANEL.—An amended challenge to the panel of jurors, is a substitute for the original.

EVIDENCE ON CHALLENGE TO PANEL OF JURORS.—On a challenge to the panel of jurors in a criminal case, the defendant cannot offer his *ex parte* affidavit in evidence in support of the challenge. On such challenge there must be an oral examination of the witnesses in open Court, where they may be cross-examined.

IDEM.—A defendant cannot, by incorporating his *ex parte* affidavit into his statement of the grounds of challenge to the panel of jurors, make it evidence of the facts averred in the statement.

QUALIFICATION OF JUROR.—A person is not disqualified as a juror in a cause, because he has formed an opinion from what he has heard concerning the guilt or innocence of the accused which it would require evidence to remove, if the opinion is not an unqualified one, and the juror is willing to give the accused a fair trial.

Statement of Facts.

IDEM.—A person is not disqualified from being a juror in a criminal case because he is unable, when questioned, to define the word "qualified."

POSSESSION OF STOLEN PROPERTY.—There is no error in charging the jury that the mere possession of stolen property will not justify a verdict of guilty, but there must be proof of other facts tending to establish the guilt of the accused; *provided*, all the facts in evidence prove defendant's guilt beyond a reasonable doubt.

APPEAL from the County Court, Nevada County.

The defendant was indicted for stealing a mare at the County of Nevada, on the 20th day of November, 1872.

The trial was had at the August term, 1873. A venire was issued to the Sheriff to summon a panel of twenty-four jurors. When the case was called for trial, the defendant challenged the panel, and based his challenge on an affidavit filed. The affidavit alleged that the accused could not have a fair trial, because the jurors were prejudiced against him; that the Sheriff and Under Sheriff had frequently stated that he was guilty, and were prejudiced against him, and had summoned jurors who were prejudiced against him. Attached to the affidavit was a paper containing a challenge to the panel, and assigning causes similar to those stated in the affidavit. The Sheriff and Under Sheriff were then sworn, and the challenge was overruled by the Court.

J. W. Lockwood was called as a juror, and, on examination as to his qualifications, after being challenged by the defendant for bias, said, he had an opinion from what he had heard concerning the facts of the case. That it would take evidence to establish it, whether true or false. That he understood the meaning of the word "qualified" to be, when a thing is proved to be a fact, then it is qualified, and then is so, to a certainty. That he had an opinion which was an unqualified opinion, as to the guilt or innocence of the accused.

On cross-examination by the District Attorney, the juror said he had never formed an unconditional opinion as to the guilt or innocence of the accused, but could give him an impartial trial. The District Attorney denied the challenge, and the Court overruled it.

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W. A. Sigourney was also called as a juror, and, on examination as to his qualifications, said he had formed an opinion which it would require evidence to remove. That this opinion was formed from what he had heard people say about the case. He did not consider this an unqualified opinion.

On examination by the District Attorney, the juror said the opinion he had formed was based entirely upon hearsay. That it was not an unqualified opinion. That he could try the case fairly and impartially, regardless of the opinion formed.

The defendant's counsel challenged the juror for bias. The District Attorney denied the challenge, and the Court overruled it. The defendant was adjudged guilty, and appealed.

The other facts are stated in the opinion.

J. I. Caldwell, for the Appellant, argued that, as the defendant's affidavit stated that the Under Sheriff who summoned the jury had expressed his opinion of the guilt of the defendant, the challenge to the panel was well taken, and the challenge to the jurors Sigourney and Lockwood was well taken, and that the charge of the Court was erroneous as to the possession of stolen property.

John L. Love, Attorney-General, for the People, argued that the affidavit of the defendant was not admissible to prove anything on the challenge to the panel, and cited Penal Code (Sec. 1,082), and that the challenges to the jurors Sigourney and Lockwood did not state whether they were made for actual or implied bias, and the examination of the jurors did not disclose any bias. As to the charge of the Court, he cited *People v. Chambers*, 18 Cal. 382; *People v. Ah Ki*, 20 Cal. 178; and *People v. Redundo*, 44 Cal. 538.

By the Court, MCKINSTRY, J.:

The writing purporting to be a statement of evidence, cannot be regarded. It constitutes no part of the Bill of Exceptions certified by the County Judge.

Opinion of the Court — McKinstry, J.

The defendant filed an affidavit, and then challenged the panel of jurors "for the reasons set forth in the affidavit." The prosecuting officer demurred to the challenge, and the defendant amended by filing a separate paper. The amended challenge was a substitute for the original. But if the two could be considered as one, the affidavit was not offered as evidence to support the challenge. Had it been, the Court below would have sustained an objection to its introduction. A witness cannot substitute his *ex parte* affidavit for an oral examination and cross-examination; nor can a defendant, by incorporating his own affidavit into his statement of the grounds of a challenge, make it evidence of the facts averred in the statement. The challenge is the pleading; its averments must be proved by legal evidence.

The amended challenge was denied by the District Attorney, and the only witnesses examined at the trial of the issue thus made were the Sheriff and his Under Sheriff, Potter. The County Court overruled the challenge, and we do not think this ruling should be disturbed.

Nor was there any error in overruling the challenges to the jurors Lockwood and Sigourney. That the former was unable accurately to define the word "qualified," does not prove that he was disqualified.

The appellant has separated from that which precedes and follows it, the following language in the charge of the Court: "If you believe, from the evidence, that the defendant was found in possession of the mare described in the indictment, after the alleged taking, this is a circumstance tending to show guilt, but not sufficient, standing alone and unsupported by other evidence, to warrant you in finding him guilty; there must, in addition to proof of the possession of stolen property, be proof of corroborating circumstances tending to establish guilt. These corroborating circumstances may consist of acts or conduct, or declarations, or any other circumstances tending to show the guilt of the accused."

It is objected that by this instruction a conclusive effect is given to any circumstances, however trivial, after possession is shown.

Points decided.

We do not think this criticism is justified by the words employed, and are quite sure that no such impression could have been made on the minds of the jurors by the charge as a whole. The jury had just been informed that mere possession, "however soon after the taking," was not sufficient to justify a conviction, and immediately afterward were told that, if the possession was proved, and there was also proof of other circumstances tending to establish the guilt of the accused, "they could consider the fact of the possession, together with such corroborating circumstances, and give them such weight as they believed them entitled to." The Court explained the rule as to the degree of evidence necessary to a conviction in criminal cases; that the jury must be convinced to a "moral certainty," "beyond a reasonable doubt;" and at the request of defendant, charged: "All the circumstances must not only be consistent with defendant's guilt, but inconsistent with any other rational conclusion."

Thus, the context considered, the charge in effect declared that mere possession of stolen property would not justify a verdict of "guilty;" that there must be proof of other facts tending to establish guilt, and all the facts must prove guilt beyond every reasonable doubt.

Judgment and order denying a new trial affirmed.

Mr. Justice RHODES did not express an opinion.

[No. 10,082.]**THE PEOPLE v. WM. B. O'NEIL.**

JURY IN CRIMINAL CASE.—A jury in a criminal case must, within the meaning of the constitution, consist of twelve men. The defendant cannot consent to be tried by a jury composed of a less number.

INDICTMENT.—An indictment which charges the defendant with feloniously assaulting a female, by throwing her on her back, and attempting to have sexual intercourse with her, with intent to outrage her person, does not charge an assault with intent to commit rape.

ALLEGATION IN INDICTMENT.—An indictment must allege that the offense was committed within the county in which it is found.

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Opinion of the Court — Rhodes, J.

APPEAL from the County Court, Del Norte County.

The charging part of the indictment was as follows: "The said William O'Neil, on the 9th day of April, A. D. 1873, and previous to the time of finding this indictment, on the point west of Crescent City, did unlawfully and feloniously assault one Hannah Dunlay, with intent to outrage her person, by throwing her (the said Hannah Dunlay) on her back, and attempting to have sexual intercourse with her; all of which is contrary," etc.

The defendant consented to be tried by a jury of eleven men. He appealed.

The other facts are stated in the opinion.

Chamberlin and *De Haven*, for Appellant, cited *Norval v. Wise*, 2 Wis. 22; *Carpenter v. The State*, 4 How. (Miss.) 163; *Jackson v. The State*, 6 Blackf. (Ind.) 451; *Doebler v. The Commonwealth*, 3 S. and R. 236; *People v. Trim*, 37 Cal. 274; *Cancemi v. The People*, 18 N. Y. 128.

Attorney-General Love, for Respondents.

By the Court, RHODES, J.:

The defendant was convicted of an assault, with intent to commit rape. The verdict was rendered by a jury consisting of only eleven jurors; and this is assigned by the defendant as error. The Attorney-General confesses the error; and it may be added that the authorities cited by the defendant establish the proposition that a jury in a criminal action must, within the meaning of the constitution, consist of twelve men.

The indictment does not charge an assault with intent to commit rape. It, at best, only charges an assault. It is not alleged that the offense was committed within the county in which the defendant was indicted.

Judgment reversed, and cause remanded. Remittitur forthwith.

Statement of Facts.

[No. 2,273.]

**GEORGE W. TYLER v. CHARLES A. GRANGER,
SAMUEL FISHER, ZENAS FISHER, ARCHIE
WOODWARD AND JOHN FREEBORN.**

RIGHTS AND DUTIES OF TRUSTEE.—When a conveyance is made to a person as trustee, and he, at the same time, executes and delivers to the grantor a declaration in writing in which there is no ambiguity, stating the objects and purposes of the trust, the powers and duties of the trustee, with reference to the trust estate, are to be ascertained from the deed and the declaration; and when so ascertained, the rights and duties of the parties must be controlled thereby.

RIGHT OF TRUSTEE TO POSSESSION OF TRUST PROPERTY.—If the owner of land who is indebted to another person, conveys the same to a third person in trust, and the trustee makes a declaration of the trust in writing, in which it is stated that he holds the land in trust to sell the same at the end of sixty days and apply the proceeds to the payment of the debt of the *cestui que trust*, unless within said time the *cestui que trust* finds a purchaser who will pay the debt to the trustee, and then to convey the land to such purchaser upon such terms and conditions as the *cestui que trust* may dictate, the trustee has not the right to the possession of the land during the sixty days, nor afterwards.

IDEM.—In such case, if the debt is satisfied before a sale and conveyance made by the trustee in pursuance of the terms of the trust, equity will compel the trustee to make a conveyance to the *cestui que trust* or his assigns, upon the payment of the amount due the trustee for his services and expenses.

IDEM.—In such case the *cestui que trust*, or his assigns, may continue in the use and possession of the property until a sale and conveyance of the same, in pursuance of the terms of the trust.

EJECTMENT BY TRUSTEE TO RECOVER TRUST ESTATE.—A trustee to whom land is conveyed by a debtor, with power to sell and use the proceeds in payment of the debt and the expenses of the trust, and whose powers and duties are prescribed by a declaration of trust in writing, and who merely holds the title in trust as security for the debt, cannot maintain ejectment against the *cestui que trust*, or his assigns, to recover the land.

APPEAL from the District Court, Fifth Judicial District, County of San Joaquin.

John F. Stayton, W. H. Devries and John F. Smith gave their joint and several promissory note to W. M. Ryer for the sum of forty-six hundred dollars, payable on the 22d day of October, 1862. As between the makers of the note, Stayton was to pay one half of it; and, on the 7th day of

Statement of Facts.

January, 1863, the note had been placed by Ryer in the hands of the plaintiff, who was an attorney, for collection. On the last named day, one half the amount due on the note was three thousand and five dollars, and Stayton executed to the plaintiff a deed of a tract of land in San Joaquin County, and at the same time the plaintiff executed to Stayton a declaration of trust, of which the following is a copy:

“To whom it may concern:— This writing witnesseth that John F. Stayton has this day assigned and conveyed to me all his interest in certain swamp and overflowed land situated in township four north, range five east, Mount Diablo Meridian, being seventeen hundred and sixty acres, and sections, or parts of sections Nos. 21, 22, 27, 28, 33 and 34, respectively, and surveys Nos. 52, 53, 54 and 477, respectively; and also his interest in certain Government lands, open to preëmption, situated in the same township, range and meridian as above, containing seven hundred and twenty acres, being parts of sections twenty-eight and thirty-two, in trust for the following uses and purposes, to wit: at the end of sixty days from this date to bargain, sell, assign and convey the same to such person or persons, and for such price or prices and upon such terms and conditions as I may see fit, and the net proceeds realized from such sale or assignment, to apply to the payment of one half of the amount due, principal and interest, on a certain promissory note, signed by said Stayton and others, dated October 22, 1860, for four thousand six hundred dollars, and interest, at one and one half per cent. per month, payable to Wm. M. Ryer or order, on or before October 22d, A. D. 1862, on which said note there is due to-day, principal and interest, six thousand and ten dollars, one half being three thousand and five dollars, and the balance, if any remaining, (after paying myself my charges and costs) to pay to him, said Stayton or his assigns, unless at any time within said sixty days the said Stayton or his assigns, shall find me a purchaser for the said land so conveyed to me as above, either absolute or conditional, who will advance and pay to me

Statement of Facts.

“in gold coin” the amount of one-half of said note, principal and interest, due at the time of such advance or payment, and also my charges, costs and expenses incurred by reason hereof, then and in such case to convey and assign the said Stayton’s interest in the above mentioned lands, as conveyed and assigned to me, as aforesaid, to such purchaser or purchasers and upon such terms and conditions as said Stayton or his assigns may dictate to me. Such conveyance or assignment, or conveyances or assignments, to be at the cost and charge of said Stayton or his assigns.

Witness my hand and seal this 7th day of January, A. D. 1863.

GEO. W. TYLER. [L. s.]”

At the time of the conveyance to the plaintiff, the land was subject to a lien by attachment in the suit of *Frank Stewart v. John F. Stayton*, and was in the possession of Stayton. Judgment was entered in the attachment suit, and the land was sold and bid in by A. N. Fisher, for his own benefit and the benefit of defendants, Samuel Fisher and Zenas Fisher. Within six months of the sale, and before October, 1863, the plaintiff paid to the Sheriff the amount necessary to redeem the land from the sale. Before said redemption, the defendants entered into the possession of the land, and were in the possession at the commencement of this suit.

After the conveyance to the plaintiff, and before the commencement of this suit, Devries, one of the makers of the note, paid the whole sum due thereon, except the sum of six hundred and eighty-nine dollars. The plaintiff, before the commencement of the suit, had delivered the note to Ryer, and was not, from the time of the delivery, authorized by Ryer to collect the remainder due on the note. It does not appear what was the date of the payment by Devries, or the date when the plaintiff delivered the note to Ryer. The plaintiff, in October, 1863, advertised the land for sale, and, on the 10th day of November, 1863, sold it to defendant Woodward for seven hundred dollars. One of the conditions of the sale was that the plaintiff should place Wood-

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ward in possession of the land. Woodward paid only part of the purchase-money, and did not receive a deed from Tyler. The payment of the remainder, and the execution of the deed, were deferred until the plaintiff could place Woodward in possession, and this action was brought to enable the plaintiff to place him in possession. After the plaintiff had delivered the note to Ryer, the latter transferred it to the defendant Samuel Fisher, and Fisher, at the time of the commencement of this action, owned it. April 16, 1864, Stayton conveyed to defendant, Samuel Fisher, his interest in the land. Defendant Granger was in possession by the consent of the Fishers.

This suit was commenced, on the 12th day of March, 1864, to recover possession of the land, and damages for its detention.

The Court below took an account of the amount due the plaintiff for his services as attorney and as trustee, and rendered a judgment in his favor for the sum of four hundred and eighty dollars, but did not direct him to convey the property to Stayton or his assigns. The plaintiff appealed.

The other facts are stated in the opinion.

G. W. Tyler, in pro. per., for the Appellant.

J. H. Budd, for the Respondents.

By the Court, SPRAGUE, J.:

This was an action of ejectment by a trustee of an express trust against subsequent grantees of the grantor of the trust estate.

The complaint alleges an absolute conveyance of the premises to plaintiff by one John F. Stayton, and also the object and purpose of the conveyance, to which complaint is attached a declaration of the trust made and executed by plaintiff, and delivered to Stayton at the same time of the execution and delivery of the deed to plaintiff.

Defendants demurred to plaintiff's complaint upon the ground, among others, that the complaint did not state facts sufficient to constitute a cause of action. The de-

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murrers were overruled, and defendants then answered, not denying the material allegations of the complaint, but alleging new matter in the nature of a cross-bill for a redemption of the premises, with a prayer that plaintiff be decreed to convey the legal title held by him to Samuel Fisher, one of the defendants, upon the payment to him of his reasonable costs, charges and expenses in relation to said land, together with the expenses of the conveyance.

The substantial averments of this answer are, that the conveyance of the premises in controversy to plaintiff by Stayton was intended to be and was, in fact and effect, a mortgage thereof by said Stayton to secure the payment of a promissory note for four thousand six hundred dollars, made by said Stayton, W. H. Devries and J. F. Smith: that at the time of the commencement of this suit, all of said note had been paid except six hundred and eighty-seven dollars, and that at the time of said answer, one of the defendants, Samuel Fisher, was the owner and holder of said note, and the object and purpose of said conveyance to plaintiff in trust has been fully accomplished; that plaintiff had never attempted to execute his trust; had never performed any services or incurred any costs or expenses in the performance of the duties devolved upon him on the acceptance of the trust; that the defendant, Samuel Fisher, is the legal owner of all the right, title and interest that J. F. Stayton had, or since has had, in the premises sued for; that plaintiff as trustee never had, and never was entitled to have, the possession of the premises sued for; that Stayton continued in possession of the premises from the time of his execution of the deed to plaintiff as trustee until the month of October thereafter, when he delivered possession of the same to one A. N. Fisher; that subsequently A. N. Fisher delivered the possession thereof to defendant Charles A. Granger, whose right of possession is not yet ended or determined; that the *cestui que trust* and holder of the note which the conveyance of the premises to plaintiff was intended to secure, had been otherwise secured at the time Stayton delivered possession to A. N. Fisher in October, 1863, at which time plaintiff had no possession or

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control of, or right of possession of, the note, which the conveyance of the premises to him in trust was made to secure, and no right to do any act in relation to the same; that the defendant, Samuel Fisher, ever has been ready and willing, and is still ready and willing, to pay plaintiff all his reasonable, proper and legal expenses, costs and charges in relation to said real estate.

Upon the filing of this answer the Court ordered that Wm. Hicks, Wm. H. Devires and M. L. Bird, his assignor in insolvency, J. F. Smith and J. F. Woodward be made defendants and summoned to answer; and subsequently these new parties, with the exception of Smith, appeared and answered. Something more than three years thereafter the cause seems to have been tried before the Court, and special findings of fact and conclusions of law therein filed with an order as follows: "It is therefore ordered that this cause, the attorneys for plaintiff and defendant in open Court consenting thereto, be referred to the Court Commissioner to take testimony herein, from which may be determined the amount to which the said George W. Tyler is entitled for costs, expenses and services rendered in and about the business of collecting payment of said note as attorney at law, or trustee of and for said W. M. Ryer, and that said Commissioner make report at the next term of this Court." And subsequently, in September, 1868, the Commissioner having made his report, finding the amount due said Tyler to be four hundred and eighty dollars, the Court confirmed the report and rendered judgment against defendants and in favor of plaintiff in the sum of four hundred and eighty dollars and costs of suit. From this judgment plaintiff alone appeals, without any statement on appeal; hence the only questions presented for our consideration are those only arising upon the judgment roll.

Upon the trial of the case as made by the complaint of plaintiff, the answer or cross-complaint of defendants and the answers of Woodward, Hicks, Bird and Devires, who had been brought in and made parties by order of the Court, the Court made and filed its findings of fact and conclusions of law substantially as follows:

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That on the 7th day of January, 1863, John F. Stayton conveyed to plaintiff, by deed duly executed, the real estate described in Exhibit A (being the declaration of trust) attached to the complaint; that the real estate was so conveyed in trust that at the expiration of sixty days from its date the grantee therein might bargain, sell, assign and convey the same, and apply the net proceeds realized from such sale or assignment to the payment of one half of the amount due, principal and interest, on a certain promissory note, signed by said Stayton and others, dated October 22, 1860, for four thousand six hundred dollars and interest at one and one half per cent. per month, payable to William M. Ryer or order on or before October 22, 1862, and the balance, if any remaining after paying the charges and costs of the trustee, to be paid to said Stayton or his assigns; that at the time of the conveyance as aforesaid to plaintiff the said John F. Stayton owed to one William M. Ryer the one half of a note for four thousand six hundred dollars and interest thereon; that said note was the joint and several note of said Stayton, William M. Devries and J. F. Smith, and that the portion thereof due from said Stayton was three thousand and five dollars; that after such conveyance said Devries paid the whole of said note, except about the sum of six hundred and eighty-nine dollars, and that after such payment the said Devries was duly discharged from all his debts and liabilities by decree duly entered in 1864 in the County Court of San Joaquin County, and that M. L. Bird was duly appointed assignee of said Devries, and that the said payments were made and said discharge obtained before the commencement of this suit; that in October, 1863, defendants, with the consent of Stayton, took the possession of the premises in controversy, after a purchase thereof at Sheriff's sale, before the time of redemption had expired, which sale was by virtue of a judgment, which was a lien upon the premises before and at the time the trust deed was made to plaintiff, and defendants have since continued in possession thereof; that prior to the commencement of this suit the plaintiff had delivered to said Ryer the said note of four thousand six

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hundred dollars, and at the time of its delivery there remained due in full payment thereof the sum of _____ dollars, and that from and after the delivery of said note to said Ryer the plaintiff was not, by the said Ryer, in any manner empowered to collect the balance due upon said note, nor was he ever authorized by said Ryer to sell said premises so conveyed to him for the purposes in these findings stated; that no portion of the amount due upon said note from said Stayton having been paid to said Tyler by Stayton, and no portion of the charges, costs and expenses, amounting to _____ dollars, of the said Tyler, in obtaining payment of said note in favor of said Ryer, having been paid to the said Tyler by any one, he, the said Tyler, did, in the month of October, 1863, advertise said real estate for sale on the 10th day of November, 1863, and that upon said day did sell the same, at public auction, to F. J. Woodward, a party to this suit, for the sum of seven hundred dollars; that one of the conditions of such sale, expressed at the time thereof, was that the purchaser should be put in possession of the same; and that this suit on the part of the plaintiff is brought to recover possession thereof, in order that he may deliver the same to Woodward, the purchaser as aforesaid; that subsequent to the delivery of said note by Tyler to Ryer, whose property it was, he, the said Ryer transferred the same to Samuel Fisher, one of the defendants, upon the payment to him by said Fisher of the sum of six hundred and eighty-nine dollars, the balance due thereon, and at the time of the trial of this cause the said note was the property of said Samuel Fisher; that at the time of the trial of this action the said Samuel Fisher had become possessed (by deed of April 10, 1864, executed by John F. Stayton to Samuel Fisher), of all the right, title and interest that the said Stayton previously had in and to said real estate, the subject-matter of this suit, and that at the time of the trial hereof the said Fisher still continued the owner of said Stayton's interest, whatever is was in said real estate.

Upon the foregoing facts the Court pronounced the following conclusions of law:

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“If, as a question of law, the plaintiff herein, from the facts above found, had a right to sell said real estate, then as a conclusion of law, I find that plaintiff is entitled to the possession of said real estate as against defendants, and to a judgment against said defendants for two hundred and ninety-nine dollars per month, rents and profits, since the 14th day of November, A. D. 1863, of such real estate and for his costs of suit.

“Believing, however, that said plaintiff had no right at the time of making sale of said premises to the said Woodward to sell and convey said premises, and further believing that said Tyler as the attorney at law of the said Ryer, having in his hands for collection the said note of four thousand six hundred dollars, did, by virtue of the deed to him from John F. Stayton, of date January 7, 1863, hold the premises therein described as security, and not otherwise, for the payment of the said note, and all proper charges, costs and expenses incurred on the part of the said Tyler in collecting said note; and defendants in their answer admitting that such was the object and purpose of said conveyance as made between the said Stayton and the said plaintiff, and having in their answer offered to pay to plaintiff all just, reasonable and proper charges, costs and expenses by him incurred in making collections upon said note, and in his lawful relations to the premises conveyed to him as aforesaid, I, as the conclusions of law from the above specified facts, and upon which judgment is to be entered in the case, do find:

“First — That said conveyance from John F. Stayton to plaintiff was given and intended as a mortgage to secure the payment of said note of four thousand six hundred dollars, and such proper charges, costs and expenses as might be incurred by plaintiff in making collection of said note.

“Second — That said plaintiff is entitled to judgment against defendants for such sum as may be a reasonable charge for his services, costs and expenses in and about the business of collecting payment of said note, and that upon the payment of said sum to said plaintiff (when said sum shall have been ascertained) by the defendants, that the

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defendant Samuel Fisher is entitled to have and receive of and from the said plaintiff a deed of conveyance of and to the premises described in plaintiff's complaint." And then follows the order referring the case to the Court Commissioner to take testimony from which to determine the sum to which plaintiff is entitled for his costs and services hereinbefore cited.

The conclusions of law upon the facts as found by the Court, are manifestly erroneous. It by no means follows that if the plaintiff had the right to sell and convey the premises at the date of the sale to Woodward, he had the right to the possession of the same himself, or to undertake to put his vendee in possession thereof. His rights in the premises as well as that of his grantor in trust, or his assigns, are limited and fixed by the declaration of trust executed at the same time as the deed. The intentions of the parties are to be ascertained from these instruments, and when so ascertained, the rights and duties of the parties in reference to the trust estate must be fixed and controlled thereby. (Hill on Trustees, 342, Notes 6 and 2.)

By the deed of Stayton to appellant, and appellant's declaration of trust at the same time executed and delivered by him to Stayton, the object and purpose of the conveyance, and the powers and duties of the trustee with reference to the trust estate, were fully and clearly expressed, hence there is no ambiguity as to the intention of the parties to the transaction.

The grantor was the debtor of Ryer to the extent of one half the amount of a promissory note for four thousand six hundred dollars, bearing interest at the rate of one and one half per cent. per month, executed by him with Devries and Smith, and the conveyance of the premises described in the complaint was made by him to plaintiff, Tyler, as security for the payment of one half the amount of said note. Plaintiff then held the legal title, with power at the end of sixty days to sell and convey the same and apply the proceeds of such sale, first, to the payment of the grantor's one half of such indebtedness and the costs and proper charges of the grantee or trustee, and the residue of the

proceeds of such sale were to be paid to the grantor or his assigns; and plaintiff's declaration of trust further provides, that if the grantor should within sixty days find a purchaser of said premises, either absolute or conditional, who would advance and pay to said trustee, in gold coin, the amount of one half of said note due at the time of such advance or payment, together with his costs and charges, then and in that case he was to convey or assign the lands so held by him to such purchaser, and upon such terms and conditions as the grantor or his assigns might dictate. The intention of the parties in the execution of this deed and declaration of trust cannot be easily mistaken, and that intention must be strictly adhered to in determining the relative legal rights and duties of the parties in reference to the trust estate. By these instruments Tyler was vested with such title to the premises described in the deed as the grantor possessed, in trust for the payment of a specific debt due Ryer, with power to sell and convey such title at the end of sixty days, unless within the sixty days the grantor should by sale or mortgage of the premises be able to raise an amount of money sufficient to pay such debt, together with proper costs and charges of the trustee, in which event, and on the payment of such amount to the trustee, he was bound to convey the trust estate to such person, upon such terms as said grantor or his assigns shall dictate. It is manifest that it was not the intention of the parties that the trustee should have the use or possession of the premises during the sixty days within which the grantor had the privilege of raising the money to discharge the debt by sale or mortgage of the premises, or otherwise, nor at any time thereafter; but that the grantor or his assigns should continue in such use and possession until an absolute sale and conveyance of the title held by the trustee, in pursuance of the terms of the declaration and purposes of the trust. (Hill on Trustees, pp. 475-6; *Ball v. Ball*, 3 Dayton, 384; *Seymour v. Bull*, Id. 389.) The relation existing between the grantor or his assigns and the trustee, in respect to the trust estate, before absolute sale and conveyance thereof by the trustee, in pursuance of the

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REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT

JULY TERM, 1874.

[No. 4,810.]

**JOHN WRIGHT AND JOHN H. SAUNDERS v. JAMES
McM. SHAFTER.**

RELIEF IN EQUITY ON THE GROUND OF MISTAKE.—A complaint in equity, claiming relief on the ground of mistake, must not only distinctly aver the fact of the mistake, but also set forth the circumstances under which it occurred, in so far as those circumstances may be necessary to present a case within the rule of equity upon which relief is granted.

APPEAL from the District Court, Third Judicial District, City and County of San Francisco.

The complaint alleged that, on the 27th of November, 1858, Francisco Hurtado and Maria Dolores Hurtado were husband and wife, and that they borrowed from John D. Shafter four thousand dollars, and, to secure the payment of the same, gave him a mortgage on a tract of land in Marin County, which was the separate property of said Maria, and that, on the 20th of August, 1869, they borrowed from him one thousand dollars, and gave a second mortgage to secure the same. That the defendant became the assignee of the mortgage, and foreclosed it, and the land was sold by the Sheriff on the 11th day of September,

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1871, and the defendant became the purchaser, at seven thousand five hundred and seventy six dollars and thirteen cents, and received the Sheriff's certificate. That afterwards, and on the 9th day of March, 1872, Hurtado and wife sold to the plaintiffs. That the plaintiffs, on the 11th day of March, 1872, went to the Sheriff and asked him how much money it required to redeem from the sale, and were informed by him that it required eight thousand four hundred and eighty six dollars; and that the plaintiffs relied on the Sheriff's figures, and supposed they were correct, and thereupon paid him said sum of eight thousand four hundred and eighty-six dollars, to effect a redemption. That they were informed on the 12th of March that the sum which they had paid the Sheriff was not enough to effect a redemption into ninety-six dollars, and that the Sheriff had given the defendant a deed. That they then offered to pay the defendant the ninety-six dollars and all costs and expenses he had been at, if he would give them a deed, but that he declined. That the land was worth twenty thousand dollars, and that the plaintiffs were prepared on the 11th of March to have redeemed the property. The plaintiffs offered to pay the defendant the ninety-six dollars, and all costs and expenses he had incurred, and asked that he be compelled to convey to them.

The defendant demurred, and the Court overruled the demurrer. He then answered, and the Court gave the plaintiffs judgment.

The defendant appealed.

J. McM. Shafter, in *pro. per.*

J. R. Sharpstein and H. H. Haight, for the Respondents.

By the COURT:

The plaintiffs claimed, and in the Court below obtained relief on the ground that a mistake occurred upon their part, in attempting to effect a redemption from the Sheriff's sale on foreclosure of a mortgage. It is well settled that a complaint claiming relief on the ground of mistake must not only distinctly aver the fact of the mistake, but also set

Statement of Facts.

forth the circumstances under which it occurred in so far as those circumstances may be necessary to present a case within the rule of equity upon which relief is granted. Tested by this rule, the complaint here is radically defective, and the demurrer should have been sustained.

Judgment and order denying new trial reversed, and cause remanded, with direction to sustain the demurrer to the complaint. Remittitur forthwith.

[No. 10,087.]

THE PEOPLE v. PATRICK COLLINS.

EVIDENCE OF FLIGHT OF CRIMINAL.—If four men jointly commit a robbery by taking money from the person of another, and are immediately arrested, and one of them breaks away from the officers and runs some distance before he is retaken, on the separate trial of one of the four who did not flee, evidence of the flight of the other may be received for the purpose of showing that, after his arrest, he had the opportunity to throw away the money, if, after being taken to the prison, no money is found on the persons of the robbers.

EVIDENCE ADMISSIBLE FOR A PARTICULAR PURPOSE.—If, on the trial of one charged with a crime, evidence which is competent only for a particular purpose is admitted generally, and the counsel for the defendant fails to ask the Court to limit the evidence to the purpose for which it was competent, or to ask a charge to the jury to that effect, the defendant cannot afterwards complain that the testimony was inadmissible for some other purpose.

APPEAL from the Municipal Criminal Court of the City and County of San Francisco.

The case was thus: Patrick Collins, the defendant here, Peter Stanley, Robert Smith and James McGovern were charged in the indictment with having, on the 16th day of April, 1873, committed the crime of robbery, by taking legal tender notes from the person of Charles Simonson, at the city and county of San Francisco. On the trial, the testimony for the prosecution showed, that on the 17th of April, just before daybreak, Simonson was walking down

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Pacific street, when the four men who were indicted came behind him, and while two of them held him, the other two took the money from his pocket. Simonson saw the four men but did not know them. A police officer saw the men holding Simonson, and when they let him go, asked him what they had done, and was informed that they had robbed him of fifteen dollars in legal tender notes. The officer saw the men go into a saloon, and procured the assistance of two other policemen, and in three or four minutes arrested the accused in the saloon. When they were taken into the street, McGovern broke away from the officers, and ran several blocks before he was re-arrested. Upon being taken to the station-house, the accused were searched and no greenbacks were found on their persons. Stanley had a separate trial, and the case is reported in the 47 Cal. 114. Collins was also tried separately and convicted, and this is his appeal.

On his trial, when the prosecution proposed to prove the flight of McGovern, his attorney objected to the testimony, on the ground that it was irrelevant and immaterial. The attorney for the defendant did not request the Court, in its instructions to the jury, to tell them that the testimony was received for the limited purpose mentioned in the opinion.

G. W. Tyler, for the Appellant.

Attorney-General Love, for the People.

By the Court, CROCKETT, J.:

It is assumed by counsel that this case is precisely similar to the case of *People v. Stanly*, 47 Cal. 114, and it is claimed that the judgment should be reversed on the authority of that case. But on looking into the record we find them to be materially different. In that case all the evidence was not before us; and it did not appear that when the four persons accused of the robbery were arrested, no greenbacks were found in their possession. The point which was pressed on the argument of that appeal was, that

Points decided.

the evidence of the flight of McGovern was not admissible as a badge of the guilt of the defendant on trial. Considering it solely in that light, we held the evidence to be inadmissible on the facts as then presented. But in the present case it appears that, on the arrest of the four suspected persons, no portion of the greenbacks of which Simonson was robbed was found in their possession when searched at the station-house. But it was proved that in attempting to escape, McGovern was pursued by the officer for several blocks, and, during his flight, may have thrown away the greenbacks. The evidence was competent as tending to show that he thus had the opportunity after his arrest to dispose of the fruits of the robbery without detection. If the Court, in admitting the evidence, omitted to limit it to this purpose, it was the duty of the counsel to call attention to the fact, and to request a proper charge from the Court on the point. Not having done so, and the evidence being competent for the purpose above indicated, he cannot complain that it was inadmissible for some other purpose.

Judgment affirmed. Remittitur forthwith.

Mr. Justice McKINSTRY concurred specially in the judgment.

Mr. Chief Justice WALLACE did not express an opinion.

[No. 10,107.]

EX PARTE WALL.

POWER TO MAKE LAWS.—The power to make laws, conferred by the Constitution on the Legislature, cannot be delegated by the Legislature to the people of the State, or to any portion of the people.

STATUTE TO TAKE EFFECT UPON THE HAPPENING OF A FUTURE EVENT.—Although a statute may be conditional so that its taking effect may depend upon a subsequent event which may be named in it, yet this event must be one which shall produce such a change of circumstances that the law makers, in their own judgment, can declare it wise and expedient that the law shall take effect when the event shall occur.

Statement of Facts.

LEGISLATURE MUST PASS ON EXPEDIENCY OF A STATUTE.—When the Legislature passes a law, it must pass entirely upon the questions of its expediency; and it cannot say that a law shall be deemed expedient, provided that the people afterwards, by a popular vote, declare it to be expedient.

IDEM.—A statute to take effect upon a subsequent event, must, when it comes from the hands of the Legislature, be a law ~~in present~~ to take effect ~~in future~~. On the question of the expediency of the law, the Legislature must exercise its own judgment, definitely and finally.

LEGISLATURE CANNOT REFER A LAW TO THE PEOPLE.—The Legislature has no power to refer a statute to the people, to decide by a popular vote whether it shall go into effect.

IDEM.—If a law is in existence making it a misdemeanor to retail liquors without a license, the Legislature must determine by a statute whether licenses shall be granted, and cannot refer the question of granting or refusing licenses to a popular vote.

TOWN GOVERNMENTS.—The Legislature of this State has not established a system of town governments, as required to do by section four, Art. XI, of the Constitution.

IDEM.—The Constitution is not self-executing. Town governments must be created by statute.

IDEM.—The words “system of town governments” used in the Constitution, were used with reference to town organizations in their general features like those of other States where town governments had been established when the Constitution was adopted.

POWER OF TOWN GOVERNMENTS WHEN ESTABLISHED.—When a system of town governments shall have been established by the Legislature, and when local town legislatures shall have been organized under that system, the Legislature may confide to such local legislatures the right to make local rules, but it cannot delegate to the people living within certain territorial limits, but who have no distinctive political character or governmental organization, the power to make laws.

IDEM.—The power to make laws must be exercised by the Legislature; that to make by-laws for a town, by the local legislature.

By an Act of the Legislature of this State, approved March 18, 1874, it was provided that, whenever one fourth of the legal voters of any township, incorporated city, or town, should petition the Board of Supervisors of the county in which the township, incorporated city or town was situated, to call a special election to vote upon the question of “liquor license,” or “no liquor license,” the Board of Supervisors must, within one month after the petition was filed, call a special election in the township, incorporated city, or town, to vote upon the question of license to retail liquor. That at such

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election the ballots must contain the words "for license," or "against license," and if a majority of the ballots were "against license," then no license to retail liquor should be granted in the township, city, or town, where the election was held; and that it should be unlawful, after the result of the election was declared, for any person to sell or dispose of any spirituous, vinous, malt, or other intoxicating liquors, in less quantities than five gallons, until at a new election to be held not less than two years after such election, a majority should vote in favor of license. The Act further provided that any person who should sell or give, or offer to sell or give any such liquors within any township, city or town, contrary to its provisions, should be guilty of a misdemeanor, and upon conviction, pay a fine not exceeding twenty-five dollars for the first offense, and not less than fifty, nor more than one hundred for each subsequent offense, and be imprisoned in the county jail until the fine was paid, for a period not to exceed one day for every one dollar of the fine.

The petitioner, George Wall, was, on the 8th day of June, 1874, convicted before a justice, of a violation of the law in the fourth township of Contra Costa County, and fined twenty-five dollars, and having failed to pay the fine, was committed to the county jail for twenty-five days, or until he should pay the fine. He applied to the Supreme Court to be released on *habeas corpus*.

John B. Felton, for the Petitioner.

The law is in direct opposition to the natural rights of man, as laid down in the Declaration of Rights in the Constitution of California.

The Constitution of California declares these rights to be inalienable. By consequence the Constitution has not attempted to restrict the power of the Legislature over these rights. It declares in substance that government itself has no power over them, and that, therefore, the people, the source of government, cannot delegate what they themselves never had. The rights of property, life, liberty and the pursuit of happiness precede government, and the only

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limitation of these rights is the rule that they shall not be used to the injury of others.

The right of a man to use and dispose of wines, beers, liquors, etc., is a natural right of property, and can only be limited or restricted by the Legislature so far as the exercise of that right interferes with the exercise of the rights of others. The possibility that one man may use these articles of property to excess, and so injure himself or be dangerous to others, is no reason why another man should be deprived of the right to use or dispose of these articles. If a man uses these articles in excess, to his own injury only, and not to the injury of others, he is exercising a right of abusing his own property, and though blameworthy, is not within the prohibitory power of the law. If he, through an excessive use of these articles, becomes dangerous to others, he then becomes amenable to the law. But the article, the abuse of which has led to his thus becoming dangerous, cannot be taken away from others who are capable of using it in a proper manner.

The natural rights of the individual cannot be taken from him. Hence it follows that our Constitution never attempted to alienate those rights which it declares inalienable. Acting under this plan, the framers of the Constitution simply contented themselves with the general statement: "We do not propose to delegate to the Government any power over natural rights, because we have no such power;" and hence they did not attempt to put any restrictions upon the use of such powers. There was no use in putting restrictions on powers not granted at all. Thus, if a law were passed by the Legislature that every man in California should have his nose cut off, or his feet amputated, you will find no clause in the Constitution forbidding it. If the Legislature passed a law absolutely forbidding all marriages, the Constitution would be invoked in vain to find anything which prohibits the Legislature from so doing. The right given by the Constitution to the various branches of Government is to harmonize the natural rights of all. To bring about this harmony it is frequently necessary to put heavy and grave restrictions on the rights which

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the individual would have if he were alone and not a member of society. But "the true principle is, that the sole end for which mankind are warranted individually or collectively in interfering with the liberty of action of any other member, is self-protection. The only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because in the opinion of others to do so would be wise or even right. There are good reasons for remonstrating with him, or persuading him, or entreating him, but not for compelling him, or visiting him with any evil in case he do otherwise.

The Legislature cannot take away the inalienable rights of man; it can only protect them. If it passes laws the Courts have the right, and it is their duty, to examine these laws in the light of the Constitution, and declare them void when the Legislature, in passing them has transgressed its jurisdiction. But it is said and thought by some that if a law of the Legislature is constitutional upon its face, that the Courts can inquire no further, but must uphold it. This I deny. It is the province of the Court to decide, not merely whether the law is *prima facie* constitutional, but whether it indirectly attacks the liberty of the subject. A law may be constitutional on its face, and yet be utterly subversive of inalienable rights. Suppose a law were passed that no man should build or occupy a house that was not a thousand feet square and ten stories high. Suppose all men and women under ten feet high were prohibited from marrying; that no man should own a piece of land containing less than ten thousand acres. Suppose the sale of diamonds weighing less than a pound was prohibited — would it not be clear to the most careless observer that under the guise of regulating, an attack was made upon the very essence of the rights of family and marriage? Or suppose the Legislature should pass a law that John Smith should be buried by a certain day at the

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public expense. This law would, upon its face, be constitutional, for the presumption would be that John Smith was dead, and that his body ought not to be allowed to rot above ground. But it turns out, when it comes to apply the law that John Smith is alive, and that to carry out the law it is necessary to kill John Smith or bury him alive.

Now, here is a case where the law on its face is apparently for a legal and constitutional object. The unconstitutionality only appearing from a fact, *dehors* the law. Is such a law good? To hold that the Legislature can thus indirectly and covertly do what it cannot do directly; that it can attain an unconstitutional object by simply changing the mode of expression of the law, is to make all constitutional rights depend on the skill of the draughtsman. There is no usurpation that cannot be concealed under an appearance of using a constitutional power.

Let us see what prohibition does. It prohibits the use of these articles, not merely to him who makes a bad use of them, but also, to that very great class of persons who make a good use of them. The man of a melancholy disposition, the man whose blood is impoverished, the enfeebled by disease, the temperate man, who can use the goods things of this life, must give up what they have a natural right to do, simply because a fellow-mortal, using the same article, is tempted to excess. I admit, fully, the great limitation which society justly puts to the use of one's own property. So use it as not to injure the property of another; or rather, let us carry the maxim further; so use your property as not to injure another. I fully concede this limitation; but here I stop. It cannot be extended to the rule, which must be laid down before prohibition is justifiable in this case — the rule that you should not use your own property at all, because another man may use his property to the detriment of himself or society.

Liquors used in moderation, and to satisfy a desire common among men, can be indulged without injury either to the man or to society. They are only dangerous when taken in excess. But the law in question is absolutely prohibitory of the right to dispose of any wines, lager beer, or

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spirituous liquor, in those precincts in which the majority of the people vote against license, on any day or at any time. It does not merely prohibit the sale of liquor under five gallons, but it prohibits the sale of liquor over five gallons as well. By section four of the Local Option Law, in case the majority of the votes cast at an election shall contain the words Against License, "then it shall not be lawful for any Court, board or officer to issue any license for the sale of any spirituous, vinous, malt or any other intoxicating liquors in said township, city or town," etc. By this section then, no license is allowed to issue for the sale of any liquors whatever. Now, in case a man should want to sell liquor over the quantity of five gallons, under the provisions of section three thousand three hundred and eighty-two of the Political Code, and sections nineteen and four hundred and thirty-five of the Penal Code, which are not repealed by the Local Option Law, but are in full force, he is obliged to take out a license quarterly, under heavy penalties, both civil and criminal. Thus, by the Local Option Law, the issue of any license is strictly forbidden in any case within the precinct which has voted against license; while, by the Political and Penal Codes, a man is punished for selling without a license, which there is no authority for issuing to him at all. And thus, if a man should sell less than five gallons, he is punished under the provisions of the Local Option Law; while if he sells more than five gallons, he is punished under the provisions of the Codes.

Again, this law instead of providing against the excess of its use, absolutely renders necessary that excess. It prohibits the sale in quantities that can be used with safety, and makes it imperative on a man purchasing to buy such a quantity as would, if he drank it, render him inevitably drunk. Besides that, it renders it difficult for a man of moderate means to purchase at all, and so makes an unjust discrimination between the rich and the poor. Now, certainly, it would not be contended that society would have the right to say to the poor man, you shall not drink at all, while the rich man may drink as much as he pleases.

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The statute is void, as being a delegation of general legislative powers to individuals. It is conceded that the Legislature cannot delegate its legislative power at all. (See *Houghton v. Austin*, 47 Cal. 646.) The only question, then, presented in this case is, whether it does involve a delegation of the legislative power?

It is also an admitted proposition that power can be delegated to local bodies to legislate over their local matters. The question in this part of the case divides itself into two questions: 1st. Is the power here delegated a power given to a locality to legislate over its local matters? 2d. If it is not, is the right which the people have under this law a delegation of legislative powers?

I shall argue the second question first: Is this law a delegation of the legislative power?

If a man passes from the precinct of Oakland to that of Alameda, he finds himself in a line which separates two townships with different laws. In one precinct he cannot buy a glass of wine without being accessory to a misdemeanor. In the other precinct, wine, lager beer and spirits are sold openly under a regular license from the Board of Supervisors of the same county in which Oakland is situated. He is naturally astonished at the difference, and asks why it is that a permitted trade in one precinct is a crime in another. "Has the Legislature passed such a law?" he asks. "No," the answer is; "the Legislature passed a law that liquor should be prohibited in those precincts where the people of the precinct said it should be prohibited, but that its sale should be permitted in those precincts where the people said it should be permitted." If this answer is correct, does it not seem too plain to admit of an argument, that the rule which forbids the liquor merchant of Oakland from selling his wares comes directly from the people, and that the Legislature has only made a rule that the people may make the rule on the subject; that the Legislature has not made the rule, but left it to the people whether it shall say: The law is that the sale of liquor shall be prohibited, or the law is the sale of liquor shall be permitted.

And when the liquor dealer of Alameda says, "the law

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permits me to sell," does he not mean to say, "the people of Alameda permit me to sell?" When the liquor dealer of Oakland, on the other hand, says, "I am forbidden to sell," does he not mean to say, "the people of Oakland have forbidden me to sell?" In other words, in both cases, does not the rule of action, "you may sell, or you shall not sell," emanate directly from the respective people of the two precincts? Has the Legislature done anything else than to grant to the people of each precinct the right of making a rule, each one for itself?

If this is a fair statement of the case, then we have these propositions:

The Legislature has granted to the people of each precinct the right to make one rule, or another directly the reverse. The people of one precinct have made one rule. The people of the other precinct have made the opposite rule. The people of the two precincts are living under diametrically opposite laws. Why? Because the people of one said, "you may sell;" the people of the other said, "you shall not sell." Now, in a case like this, is it susceptible of argument that the people of each precinct made the Legislative Act? They judged of its expediency; they gave it the sanction of the law. The people of Alameda said: 1st. "It is not expedient to forbid the sale of liquor." 2d. "You may, therefore, legally sell this liquor." The people of Oakland said: "It is expedient that you should be forbidden to sell liquor. Therefore, you shall not sell it, but you shall be punished with fine and imprisonment if you do." The Legislature simply said to these people: 1st. "I constitute you sole judge of the expediency." 2d. "Whatever you judge expedient, you may clothe with the full sanction of the law." In this case, then, it would seem to be too clear for argument that the Legislature had made no law, but had simply delegated to the people of the precincts the right to make a law.

Again, if the Legislature, as is contended, did make this law, which one did it make? Did it enact that Oakland should sell no liquor, or that Alameda might? The statute is silent on both of these subjects. The Legislature has

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said no such thing. It has not even considered the question what is expedient in either precinct, any more than if I say to my daughter, which of these men will you choose, and she chooses one. The man whom she has chosen is my choice. It is here exercised under my permission to her to choose.

Now, it certainly seems a self-evident proposition that in the case which I have described, all that constitutes a law, the decision on its expediency, its binding power, came from the people. All the Legislature has done has been simply to say to the people, "what is your will? If you will prohibition, your will is law. If you do not will prohibition, say so, and there shall be none." If the Legislature has this power, then it can say to the people, "murder is a crime if you say so; seduction can be punished or not at your discretion; a new Court may be created, only say the word." In other words, the Legislature can give to the whole people, or any portion thereof, the permission to say what shall be the law, and what not. If this is the case, then it follows inevitably that the Legislature can delegate its whole or any portion of its power to the people or any portion thereof. A man must be reasoned by metaphysical arguments out of his common sense before he can come to any other conclusion than that this is a delegation of the power to make a law.

Let us now go back to the original principles of things and see why it is, and under what circumstances a legislature can make a law spring into operation for the first time on the happening of a future event. It is obvious that a change in present existing circumstances may bring about a necessity that an existing law may cease and a new one go into effect. But the Legislature is not always in session, and hence a law may become, by change of circumstance, not only useless but disastrous in its consequences. It is also obvious that with this change of circumstances may come a necessity for a new law. It is given to man to foresee what will be a duty or expedient under this change of circumstances; and hence a legislature in passing a law to take effect upon a change of circumstances only judges

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what changes of the law will be necessary when the present state of things ceases and a new state of things commences.

The Constitution of the State says: "In case of the impeachment of the Governor, or his removal from office by death, or inability to discharge the powers and duties of said office, resignation or absence from the State, the powers and duties shall devolve upon the Lieutenant-Governor for the residue of the term, or until the disability shall cease. But when the Governor shall, with the consent of the Legislature, be out of the State in time of war, at the head of any military force thereof, he shall continue Commander-in-Chief of the military force of the State." Now here we have various future contingencies provided for, each of which brings about a new rule of action or law. The impeachment of the Governor, or his absence, renders it necessary to have a new executive officer. His acquittal, or the removal of his disability, renders it proper that he should again be Governor. If the Legislature should consent to his being out of the State, and he should be out of the State, and there should be a war, then, in the happening of these three future events, he shall still continue to be Commander-in-Chief of the forces of the State.

Now, in all these cases we observe: 1st. That a change of existing circumstances is contemplated; 2d. That such change of circumstances will bring about the necessity of a change of the present rule of action; 3d. That the Legislature, or the mother or father, or teacher, or adviser, decides what that rule of action shall be in the event of a change of existing circumstances; 4th. That there is a logical connection, at least in the minds of the law-givers, between the event which is to happen, and the new rule of action which is consequent thereon.

If there is no new event to happen, which will render necessary a new rule of action, then the only duty of the Legislature is to frame a law for circumstances as they exist now. There is no reason in making the change of law depend on an event which does not change the present expediency. If, on the other hand, the event which is to happen does not change the present circumstances, but is an event which leaves things just as they were before, it is an event which

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does not affect the expediency of the present law; then there is no propriety, reason or sense in making the taking effect of the new law depend upon this immaterial event.

As a syllogism, the case would stand thus: A Legislature may make a law dependent on a future event. The expression of the will of a certain number of people is a future event; therefore, the Legislature may make a law dependent on the expression of the will of a certain number of people. The syllogism might just as well run thus: A Legislature may make a law dependent on a future event. When John Smith kisses his wife, that is a future event. Therefore, the Legislature may make any law depend on the event of John Smith kissing his wife; so that murder may be made a crime in the event that John Smith indulges in a little affectionate embrace of his wife; but is no crime if John Smith should prefer somebody else's wife.

It is evident, then, that the event on which a law may be made to take effect, is an event which changes the present condition of things so as to render that expedient which is now inexpedient, and that inexpedient which is now expedient; and that the Legislature must determine what law will be expedient in the event happening that changes the present condition of things. If this proposition is true, as I think all will concede it to be, then what becomes of this expression of the will of the people, treated simply as a future event?

Again, if the Legislature could have a law to take effect on the happening of the vote of a majority of a precinct, it might have made it dependent on the will of a minority, or any number, or not, since the event can derive no force from the number of votes for or against. And so far does this case leave the question of a passage of the law to the will of the majority of the people, that the will of the people of the State may be overwhelmingly against forbidding the sale of liquor; yet in a little precinct of four hundred votes, two hundred and one voters will impose on the one hundred and ninety-nine voters of that precinct or town, that which the whole people of the State, outside

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that precinct, may be against. To leave the question whether a law shall take effect, dependent on the will of any man, or set of men, is to substitute the will of those men in the place of what is absolutely essential to the validity of the law — that is, the will of the Legislature.

We know that the American people are brought up with the attachment to local government of towns and cities so strongly in them that it seems to be instinctive. Celebrated writers attribute the American character as distinguished from the character of other nationalities, to the fact that the town government gives firmness, independence and interest in public affairs. The Constitution seems to imply the existence of a town government with right to regulate its affairs, independent of the Legislature. (Article XI.) Thus section nine: "Each county, town, city and incorporated village, shall make provision for the support of its own officers, subject to such restrictions and regulations as the Legislature may prescribe." Here the Constitution speaks directly to the town, village, city and county. It assumes their existence. It takes away from the Legislature the power of making provision for the support of their offices.

Again: Constitution, article four, section thirty-seven — "It shall be the duty of the Legislature to provide for the organization of cities and incorporated villages, and to restrict their power of taxation, assessment, borrowing money, contracting debts, and loaning their credit — so as to prevent abuses in assessments and in contracting debts by such municipal corporations." Now, here is implied a right of the people to have these organizations; and when they exist, to have a right of local taxation. There is no provision that the Legislature shall confer upon them a right of local taxation, but only that it shall restrict a right already existing.

So, also, the Constitution is remarkable for its silence in regard to the power of taxation. If there is not some inherent power in the people of a town to tax themselves for local matters, why might not the Legislature provide that the town of Sacramento should be taxed for the local pur-

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poses of San Francisco, or should build its reservoirs or its streets? Where will you find any restriction upon the power of a Legislature to take away from one locality all its property and give it to another? There is a natural justice in the people of one locality taxing themselves, and not being taxed for the local purposes of another town, which might be, with reason, called a right inherent in the people.

Section twenty-one, article one, of the Constitution provides: "This enumeration of rights shall not be construed to impair or deny others retained by the people." But whether it is true, or not, that the powers of the cities, towns and villages are powers inherent in the people, and which still exist, except to the extent that the Legislature has a restricted right over them, is not essential to my argument, except to illustrate the broad distinction between local laws and general laws. This distinction is very clear throughout the Constitution. Thus, article five, section seven, Constitution: "He shall see that the laws are faithfully executed." Now, here there is no duty put upon the Governor to execute the laws passed by a city on local matters. This power is given to the Mayor or other head of the municipality. But, evidently, that could not be done if an ordinance of a city were a law within the meaning of the Constitution; for the reasons — 1st. If the power conferred upon a mayor of a city were an executive power within the meaning of the Constitution, it could not be delegated at all. 2d. If it could be delegated at all, it could not be delegated by the Legislature, because the Legislature has no right to use or delegate executive power.

Again, too, in section seventeen, article four: "Every bill which may have passed the Legislature shall, before it becomes a law, be presented to the Governor; if he approve it, he shall sign it; but if not, he shall return it, with his objections, to the house in which it originated — which shall enter the same upon the journal, and proceed to reconsider it. If, after such consideration, it again pass both houses by yeas and nays by a majority of two thirds

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of the members of each house present, it shall become a law, notwithstanding the Governor's objections. If any bill shall not be returned within ten days after it shall have been presented to him, Sundays excepted, the same shall be a law in like manner as if he had signed it; unless the Legislature, by such adjournment, prevent such return." Here we have a kind of law that cannot be delegated to any municipality; and yet, it is that kind of law which alone is spoken of in the Constitution. Section sixteen, article four: "Any bill may originate in either house of the Legislature, and all bills passed by one house may be amended in the other." Again, section twenty-five, article four: "Every law enacted by the Legislature shall embrace but one object, and that shall be expressed in the title; and no law shall be revised or amended by reference to its title; but in such case the act revised or section amended shall be re-enacted and published at length." Again, section thirty-one, article four: "Corporations may be formed under general laws, but shall not be created by special laws," etc. (See, also, sections 32, 34, 35, Article IV; section 12, Article VI; sections 1 and 3, Article VII; Article VIII.)

From all these sections, it is clear that those rules, properly called laws, cannot be delegated to any one, or to a corporation. But under section four, article eleven, the Legislature may establish a system of county and town governments, which shall be as nearly uniform as possible throughout the State. Hence, it follows that the Legislature may give to those governments such legislative, executive and judicial power as is necessary to regulate the local affairs of the town. It may enable the corporation to pass laws, provided their object is confined to matters interesting the inhabitants of the municipality alone. It may give the mayor power to execute these laws — thus creating a local executive. It may grant the mayor a right to be a judge, and pass judicially on questions of local matters; or it may vest the whole executive, judicial and legislative powers in one man. Evidently, in so doing, it does not delegate any of its own legislative power as given by the Constitution. It simply grants or confers new original

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powers. If these powers are delegated powers, how could the Legislature be said to delegate to a mayor delegated powers, when it has no original delegated power? How can it delegate a judicial power, when it has no original executive power? How can it delegate a judicial power to a mayor, when not only it has no such power itself, but cannot itself use such power? It could not decide a judicial question. Evidently, then, these powers are no mere delegations of power; it is creating and vesting in these corporations only new original powers, which do not fall within either of the powers given to the great departments of State — the executive, judicial and legislative.

W. H. Patterson, also for Petitioner, cited *Parker v. The Commonwealth*, 6 Penn. 507; *Barto v. Himrod*, 8 N. Y. R. 483; *Johnson v. Rich*, 9 Barb. 680; *The Aurora v. The United States*, 7 Cranch. 582; *Stewart v. Jefferson*, 3 Harr. Del. R. 76, and *Gray v. The State of Delaware*, 2 Harr. 76. Mr. Patterson made an elaborate argument, reviewing the authorities.

S. W. Sanderson, for the People.

In the first place, it is said, that the law is an assault upon the rights secured by the first section of the first article of the Constitution — that it will interfere with the right of every citizen to acquire, possess, and enjoy property. I deny this. It has been denied from the commencement, till now. It will be denied in all civilized countries from now till the end of time. It is no longer an open question. It has been decided over and over — time and time out of mind. So well settled is the law in this respect, that I do not propose to review the authorities in which it has been considered, except to refer to a single case, a decision of this Court, which I shall read, because I regard it as presenting, in a very clear and satisfactory light, all the law upon this subject. I understand that no citizen of the United States has a vested right to retail intoxicating liquors by virtue of the Constitution. I understand that a law enacted under the Constitution may prohibit the retailing

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of intoxicating liquors, for the same reason that it may prohibit any act upon the part of any citizen, which is vicious, noxious, or injurious to the health, to the peace, to the quiet, to the good order, to the good morals, and to the safety, happiness, and general prosperity of the community. Such a law is constitutional for the same reason that it is constitutional to prohibit the erection of slaughter-houses upon Montgomery street. It is constitutional for the same reason that a law is constitutional which prohibits the storing of gunpowder, nitro-glycerine, and other explosive materials along the line of Kearny street.

It is constitutional for the same reason that laws are constitutional which prohibit the use of combustible materials for building purposes, in large cities and towns — which convert ships into prisons for persons afflicted with contagious diseases, or send them, willing or unwilling, to the pest-house. It is constitutional for the same reason that laws are constitutional which prohibit prostitution, which prohibit gambling, which prohibit vice, in every form which prohibit the encouragement of, or provocation to, any acts, or the toleration of any doings, upon the part of anybody, which tend, in the remotest degree, to jeopardize or impair the great ends and objects of the social compact. (*Smith v. Keating*, 38 Cal. 702.)

It is further said this law is repugnant to the Fourteenth Amendment to the Federal Constitution. Upon that point I shall content myself with a brief reference to a late decision by the Supreme Court of the United States.

The case to which I refer is the case of *Bartemeyer v. The State of Iowa*. It will be found reported in the April number of the *American Law Register*, for 1874. I read, first from the head notes:

“The usual ordinary legislation of the States regulating or prohibiting the sale of intoxicating liquors, raises no question under the Constitution of the United States, prior to the Fourteenth Amendment of that instrument. The right to sell intoxicating liquors is not one of the privileges and immunities of citizens of the United States, which, by that amendment, the States were forbidden to abridge.”

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Before taking up, if the Court please, what I consider to be the main pivotal points in this case, I propose to notice some criticisms of this law, indulged in on yesterday by the learned gentleman who opened the argument (Mr. Patterson), in regard to its force and effect in certain cases, assuming it to be a law; not because I regard them as of any constitutional consequence, or as entitled to any weight whatever, in determining the principal questions involved in this case, but because, until satisfactorily answered, they may be calculated to prejudice our minds, at the outset, against the law; whereas our minds should be free from all prejudice when we undertake the consideration of a question of this character. It was said by the learned gentleman on the other side who addressed the Court, on yesterday (Mr. Patterson), that this law prohibited the giving away of liquor in quantities less than five gallons, by persons not engaged in the liquor traffic. Upon this branch of the subject he spoke most feelingly. He regretted that if this law is to have force and effect, the sweet music of popping champagne corks will hereafter cease to be heard at social gatherings; or if heard at all, it will be at an unreasonable cost to the host, who, in order to escape the law, must give to each of his guests at least five gallons of champagne. He also said further, that one of the effects of this law would be to prohibit executors and administrators from selling liquors belonging to the estates of their decedents, should it be necessary for the purpose of paying debts. He also said that if this law were to have force and effect it would prevent the Sheriff from seizing intoxicating liquors under any execution, and selling them in satisfaction of the debts of the judgment creditor against the debtor. He went further, and said that while the revenue laws authorized taxation to be imposed upon this kind of property, the law before the Court prevents the Tax Collector from enforcing the tax by a sale of the property.

Do all these consequences follow from this law? I most respectfully submit that they do not. The reading adopted by counsel on the other side is not authorized by any rule of statutory construction. In the construction of a statute

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we are to look to the purpose and object which the Legislature had in view in passing it. What, then, is the nature of this law? Is it a law to regulate the settlement of the estates of dead men? Is it a law for the collection of debts? Is it a law for regulating the collection of taxes? Is it a law regulating donations *inter vivos*? It is none of these, if the law is to be construed, as it must be, with some reference to the object and purpose for which it was enacted.

What, then, is the object of the law? Its object is to regulate the vending and retailing of intoxicating liquors, in quantities less than five gallons. Its object is to prevent tippling. It is aimed at a particular trade — at a particular calling — at a particular business. Its object and purpose is to regulate and control that business, and to keep it within reasonable bounds, so as not to interfere with, or injuriously affect, the general good, welfare and prosperity of society. It is in that light that we are to consider and construe it.

Is the learned gentleman upon the other side (Mr. Felton), to whom the eloquent advocate of yesterday (Mr. Patterson) referred, engaged in the business of retailing intoxicating liquors when presiding at his table? When he has a social gathering, or festive occasion, within his halls, does he stand before the law in the attitude of a man trading in intoxicating liquors? Would he be guilty of a violation of this statute if he poured a libation to his household gods, and indulged in bacchanalian festivities with his guests? When an executor or administrator proposes to sell vinous, malt or spirituous liquors, belonging to the estate of his decedent, for the purpose of paying the debts which he has left behind him, does he come before the law in the attitude of a retailer of intoxicating liquors?

When the Sheriff proceeds to seize, under execution, this species of property, and subject it to the payment of a debt, does he stand before the law in the attitude of a dealer in liquors? And so of a tax collector. This law is to receive a reasonable construction. It is to be construed so as to carry out the obvious intent and purpose of the Legislature, in passing it. Guided by this rule, the Court will not give

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to it an effect which was not intended — will not enlarge, or widen its scope, but confine it strictly to the purpose or object for which it was passed. So construed, none of the consequences, so eloquently deplored by counsel, will result from the operation of this law.

It is also said that this law will inaugurate an inequality in the punishment of offenses which may be committed by persons engaged in the liquor business. I do not understand that such will be its effect. The old law upon this subject, which renders unlawful the selling of intoxicating liquors without license, and declares that a violation of its provisions shall be deemed a misdemeanor, is in no respect, in conflict with the present law; for it, too, declares that a violation of its provisions shall be a misdemeanor. There is, therefore, no conflict between the two; but if there be, the only consequence that would result from it, would be, that the old law would go down before the new, and the inequality of punishment, if any, resulting therefrom, would be such only as always exists between municipalities operating under different laws. (*People v. Salomon*, 51 Ill. 37; *Alcom v. Hammer*, 38 Miss. 652.)

It is asserted upon the part of the petitioner that this law has not been enacted by the Legislature of the State; that if it ever has any force and effect, such force and effect will be due to the will of the people, and not to the will of the Legislature; that, in short, the action of the Legislature in the premises amounts to nothing more than a delegation of the legislative power to the people of the several towns and cities of the State, and that for that reason the law is repugnant to the first section of the fourth article of the Constitution, which vests the law-making power in the Legislature.

In answer to this, we say, first, that the statute is not a delegation of legislative power, but a conditional law, or a law which is to take effect upon the happening of a future uncertain event, and therefore not repugnant to the constitutional provision in question. Second, that if the statute be construed to be a delegation of legislative power, the power which is delegated is a part of the police power of

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the State, which may be constitutionally delegated by the Legislature to local, public or political corporations, such as counties, cities and towns.

I am aware that there is some color for the construction which counsel put upon this statute, to be found in the books. The cases upon which they chiefly rely are the cases of *Barto v. Himrod*, 8 N. Y. 486; the case of *Parker v. The Commonwealth*, 6 Penn. S. R. 507, and *Rice v. Foster*, 4 Harrington, 492. The first of these cases involved the constitutionality of the general school of law of the State of New York, and it was held that the law was unconstitutional, for the reason that it was a delegation of the legislative power, and not a conditional law. The second involved the constitutionality of a local option liquor law, which was held to be unconstitutional for the same reason. The last case also involved the constitutionality of a local option liquor law, and it was held to be unconstitutional for the same reason. In all of these cases, statutes seem to have been framed for the express purpose of being submitted to the people, in the nature of a draft, for their indorsement or rejection. Thus, the statute considered in the case of *Barto v. Himrod*, contained the following section:

“Sec. 10. The electors shall determine, by ballot, at the annual election to be held in November next, whether this Act shall or shall not become a law.”

In this language the Supreme Court of New York found some justification for the conclusion they reached, for the Legislature seemed thereby to abdicate its office and turn it over to the people; and, if the statute in hand admits of no other construction, it might fall within the rule laid down in *Barto v. Himrod*. But, we respectfully submit, that by no fair rule of construction can this statute be held to be other than a conditional law. It was claimed in *Barto v. Himrod*, that the statute then before the Court was also a conditional law, but the Court held that it was not, for the reason that the result of the popular vote is not an event in view of which the Legislature can constitutionally provide that a law shall or shall not take effect.

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It was said, with truth, that the event or chain of circumstances on which a law may be made to take effect, must be such as, in the judgment of the Legislature, affects the question of the expediency of the law; an event on which the expediency of the law, in the judgment of the law-makers, depends. On this question of expediency, the Legislature must exercise its own judgment, definitively and finally. When a law is made to take effect upon the happening of such an event, the Legislature, in effect, declares the law inexpedient, if the event should not happen; but expedient, if it should happen. They appeal to no other man, or men, to judge for them in relation to its present or future expediency. They exercise that power themselves, and then perform the duty which the Constitution imposes upon them. Substantially the same views were taken in the other two cases of *Parker v. The Commonwealth*, and *Rice v. Foster*.

Whether this reasoning be sound is the question upon which the solution of this case, so far as the present point is concerned, must depend. The distinction which was there attempted to be drawn, between the result of a popular election and any other future uncertain event, is without any foundation in the Constitution, or in reason. The idea that laws that are made to take effect upon the result of a popular vote, amount to a delegation of legislative power, is founded upon a false theory as to the true source and nature of the tenure by which the Legislature exercises and holds its power. The argument proceeds upon the theory that legislative power is derivative, and cannot, therefore, be exercised by anybody except the Legislature itself. It assumes that the constitution is a mere letter of attorney, emanating from the people to the different departments of the government, authorizing them to perform or exercise certain governmental functions. I submit that the supposed analogy is false. I submit that there is not the slightest resemblance between the relation existing between the Legislature and the people, and the relation that exists between a principal and his agent. What is the Constitution? It is declared, on the other side, to be a mere letter

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of attorney. On our side it is respectfully submitted that it is the fundamental law. It is a law unto the people as well as unto the government. It is the corner stone; the foundation, of the whole social fabric. Upon it stand, not only the three departments of the government, but also the people. The Constitution, it is true, in a certain sense, comes from the people. In a certain sense, it is begotten by them, but it comes from them like Pallas from the cleft brain of Jupiter, a new being, perfect in its individuality, with a mind and will of its own.

While the Legislature is, in a certain sense, the creature of the Constitution, yet it does not so much take its power from the Constitution as from the nature of its own existence. Plenary legislative power is by the nature of the case inherent in all State legislative bodies, and when the Constitution declares that all legislative power shall be vested in the Legislature, it only declares an universal, self-evident truth — it merely declares that the Legislature shall be the Legislature. It grants no power. It assumes that the power exists inherently, and then proceeds to restrict its exercise. Hence, in respect to the power of the Legislature, there is no principal standing behind the Constitution. The Constitution is itself the principal. There is no higher power — no higher law — by which the exercise of legislative power is to be governed. These principles were lost sight of, or ignored, by the Courts, when they undertook to say, as a matter of Constitutional law, upon what future, uncertain events, and what not, the Legislature might provide that a conditional law should take effect. That there is no provision in the Constitution which prohibits the passage of conditional laws, is admitted. It is equally true that the Constitution is silent as to what event may or may not be chosen by the Legislature as the event upon which a conditional law may take effect. It may be conceded that in passing laws Legislatures should exercise their judgment upon the question of their expediency, but it is the universal rule that the expediency of laws may depend, in the judgment of the Legislature, upon the conditions that may exist in society, and the views that may be

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entertained of the law itself by the people upon whom it is to act; and there is nothing in the Constitution which prohibits the Legislature from taking such means as they see proper for the purpose of ascertaining what such conditions and views may be. It may resort to any sources of information. It may call the people together to express their views in relation to the expediency of a law; as to whether the necessities of the people demand it, or as to whether the popular sentiment is such as to admit of its enforcement. So long as it is the duty of the Legislature, which everybody admits, to enact laws which are suited to the conditions and wishes of the people, it must and ought to be competent for the Legislature to adopt such measures as they may deem proper for the purpose of ascertaining what are the wants and wishes of the people. No one will pretend but that the Legislature may enlighten its own understanding, with reference to the expediency of a law, by submitting the question of its expediency to a popular vote in advance of its passage. Suppose the law now before the Court, or rather the principle on which it is founded — Local Option — had been first submitted to the people, and approved by them, and, upon such approval, this law had been passed, no one could be found so bold as to have questioned its validity. If this be so, why may not the Legislature prepare a law and pass it through the forms of legislation and submit the question of its expediency or approval afterwards to a popular vote? I submit that there is no distinction to be drawn between the two cases; hence, if the first be a constitutional exercise of the legislative power the last must be, by parity of reason.

It would seem to be obvious that if nothing can be found in the Constitution restricting the choice of the Legislature, as to future uncertain events upon which a law shall be made to take effect, it does not lie in the mouth of the Courts to say whether a given event is a constitutional one or not. (*Hobart v. Supervisors of Butte Co.*, 17 Cal. 30; *Blanding v. Burr*, 13 Cal. 358; *State v. Parker*, 26 Vermont, 365.)

In the State of New Jersey, a Local Option law, sub-

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stantially the same as that now before the Court, has been passed and is now in force. In that State, as in this, the validity of the law was most vigorously contested. The question was taken to the Supreme Court of the State, and determined in favor of the validity of the law, in the case of *The State v. Morris Common Pleas*, reported in the 12th American Law Register, at page thirty-six. In that case the Court, while conceding to the fullest extent the doctrine that legislative power could not be delegated, except as to the police powers of the State, held that the law was not a delegation of legislative power, but a conditional law, and that its validity, as a conditional law, was wholly unaffected by the fact that a popular vote, instead of some other uncertain event, had been made the contingency upon which it was to take effect.

In the State of Indiana, Local Option Railroad Subscription laws were held to be constitutional, but Local Option Liquor laws were held to be unconstitutional. In the case of *Maize v. The State*, (4 Ind. 344,) while it was unnecessary in determining the case to decide whether a law could be made to take effect according to the result of a popular vote, for the reason that the Constitution of that State seems to prohibit the passage of any law to take effect by the will of third parties, yet the Court considered the question, and held that a conditional law could not be made to depend upon the result of a popular election. But the Supreme Court of that State has followed the example, so worthily set it by the Supreme Court of the State of Pennsylvania, and has changed front, in logical effect, though not, perhaps, in express terms, upon the question of Local Option Liquor laws. Since the decision of the Supreme Court in the case of *Maize v. The State*, declaring the Local Option Liquor law then in force in Indiana unconstitutional, the Legislature of that State have passed an Act differing from the first, so far as the present question is concerned, only in the circumstance that instead of referring the question of license or no license, to a popular vote, it required that every applicant applying for a license, should present a written petition, signed by a

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majority of the legal voters of the town or city, as the case might be. It is very certain that this last law cannot be distinguished from the first; or if it can, it is a distinction without a difference (so far as the question under consideration is concerned,) whether the law is to take effect upon the happening of a majority vote or a majority petition; for in the one case the result is as much controlled by the popular will as in the other case, the only difference being as to the manner or mode provided for ascertaining what is the will of the people. The constitutionality of this latter law came before the Supreme Court of the State, in the very recent case of *Groesch v. The State*, reported in 42 Indiana Reports, (p. 547.) The validity of the law was assailed by counsel, upon the same grounds now urged before this Court. It was claimed that it amounted to a delegation of legislative power; that it provided for a direct intervention of the people in making and in executing the law, and that its force and effect were dependent upon popular choice.

The Local Option law of this State was passed by the Legislature, according to all the forms of legislation. It was made to take effect from and after its passage. It provided, not that the law should take effect, according as the people might or might not vote for or against license, but that it should take effect from and after its passage. It was perfect and complete when it left the halls of legislation. The people might act under it, but they could not add to it, or take from it a line or syllable. Instead of the vote of the people giving force and effect to the law, in a legislative sense, it was but one of the acts for which the law itself provided. In voting, the people do not exercise legislative power, but perform an act required by the Legislature, in the execution of the law.

As was said by this Court, in the case of *Robinson v. Bidwell*, (22 Cal. 379): "The popular vote is not the act of legislation, but simply an event upon the happening of which the law is to take effect."

As was said by the Supreme Court of Michigan, in the case of the *People v. Collins*, (3 Mich. 360): "The law does

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not take effect by force and effect of the popular vote, but by force and effect of the same will which authorizes the vote as a pre-declared and pre-determined consequence of it."

In the State of Illinois, in the case of *The People v. Reynolds*, (10 Ill. 1), the whole question of Local Option laws was most thoroughly, elaborately and satisfactorily discussed.

The question before the Court was, the constitutionality of a law providing for the division of a county, and the formation of a new county from the same territory, to take effect on a majority of the votes in the county being cast for such a division. The Court held the law to be constitutional, and in discussing the question reviewed all the cases to which I have referred, as opposed to the Local Option principle, and expressed the opinion that they found no support in the Constitution of any of the States in which they arose.

It was held that such laws were valid, whether considered as conditional laws, or laws delegating to the people of subordinate municipal corporations, a part of the police power of the State.

In the State of New Hampshire, a Local Option law in relation to the licensing of billiard saloons and bowling alleys, has been held to be constitutional by the Supreme Court. The law, like the Local Option Liquor law of this State, imposed penalties for a violation of its provisions. It does not, therefore, differ upon principle, or in material circumstance, from the law of this State; and if the former be constitutional, by a parity of reason, the latter must be.

In the State of Massachusetts, a former statute provided that no person should manufacture or sell any intoxicating liquors, unless authorized as provided therein, and declared that ale, porter, strong beer and lager beer, and all wines, should be considered intoxicating within the meaning of the act, as well as distilled spirits. The law was afterwards amended by striking out the words ale, porter, strong beer and lager beer, and provided that any person might manufacture or sell, or keep for sale, these liquors,

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but that the inhabitants of any city or town might annually vote that no person should be allowed to sell them, in which case the sale of such liquors in such city or town, should be prohibited.

Your Honors will readily perceive that the conditions which exist in this State, so far as legal principles are concerned, are almost identical with those existing in the State of Massachusetts. Prior to the passage of the Local Option law of this State, we had a law prohibiting the sale of intoxicating liquors without a license, under certain penalties therein provided for. Under this law, any one was entitled to a license to sell liquors, upon payment of a license tax as therein provided. Then came the Local Option law, which supplements the old, and provides that no license to sell liquors in less quantities than five gallons, shall be granted, if the people of the town, city or township shall, by a majority, vote against license. In the Massachusetts case referred to, the Massachusetts law was held to be constitutional, and if it be constitutional, by parity of reason, the Local Option law of this State is also constitutional.

In the State of Iowa, a Local Option Fence law, providing that stock should be allowed to run at large or not, according as a majority of the people might vote upon the question, came before the Supreme Court of the State upon the question whether it was constitutional or not, and it was decided in the case of *Dalby v. Wolfe and Palmer*, (14 Iowa, 288,) that the law was constitutional. It was claimed that the law was unconstitutional because it was made to depend upon the popular will for force and effect.

It is a mistaken idea, if the Court please, that the Local Option law of this State in relation to the vending of intoxicating liquors, is a new or novel feature in the legislative history of the country. It is true it differs from former laws upon the subject, in circumstances, but not in principle. In the license laws of Vermont, New Hampshire, Massachusetts, New Jersey and Pennsylvania, and perhaps other States, which existed prior to the adoption of the

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Local Option principle, the power to grant licenses was confided to Selectmen, to Municipal Councils, to County Courts, and Boards of Excise. In some cases full power was given over the question, and these bodies could, in their discretion, grant licenses or refuse them. In other cases, the discretion was not full, and the licensing bodies were required to grant licenses upon condition that the applicants were approbated by a certain number of freeholders, ranging from twelve to twenty. In all of these cases, if the Court please, there was a delegation of legislative power, if such it is to be called, as perfect and complete, in all respects, as under the Local Option law of this State; the only difference being, that the question of license was acted upon by Selectmen, Town Councils, County Courts and Boards of Excise, while, under the law of this State, the question of license or no license is submitted to a majority of the people. None of the laws referred to were ever supposed to be unconstitutional. No lawyer of those days was bold enough to question their validity. It was only when the people were intrusted with power over the subject that the question of the validity of such laws began to be agitated; and it is a little surprising that, under a representative form of government, which is founded upon the will and consent of the people, any one could be found bold enough to question the right of the people to be consulted as to the laws by which they are to be governed. It is surprising, that while it was admitted that conditional laws were constitutional when made to depend for their force and effect upon the action of third persons, any one could be found willing to declare that the people should not constitute such third persons. That they should, would seem to be the most consistent with the forms of popular government.

While, may it please the Court, we have found some conflict of authority as to the validity of Local Option Liquor laws, we find no conflict of authority as to the validity of Local Option laws upon other subjects. It is true there was a ripple, a few years ago, in Wisconsin, in relation to the validity of railroad subscription and subsidy laws but it soon subsided, and the rule has now become

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universal, that Local Option laws in relation to railroad subsidies, to the removal of county seats, to the erection of public buildings, such as court-houses and school-houses, and a variety of other matters, are constitutional. Such is the rule everywhere, from Maine to Texas, from Oregon to Florida. No other State has gone further than this, in upholding Local Option laws. From the commencement of the government down to the present time, Local Option laws, in one form or other, have existed, and still exist in this State.

Look at the long array of railroad subsidy laws; to the school law, which submits the erection of school-houses, and the levying of a tax therefor, to the people of the school district. Look at the statute which provides that the people of the several counties of the State may change the location of their county seats, from time to time, by a popular vote. Look at the law, which has been upon the statute book of this State from the earliest time, which provides that the trial of the right to mining claims shall be governed by the rules and regulations adopted, and in force, in the district in which the claim is situated. Here we find our first California Local Option law. Here the Legislature said to the miners of every mining district in the State: "Adopt your own rules, your own regulations; and the rules and regulations so adopted shall constitute the law by which your rights shall be determined, by which your tenure to your mining claims shall be adjudged." That law has come before this Court, at nearly every term, from the time of its passage to the present. No one ever had the hardihood to question its constitutionality.

It is respectfully submitted that these laws cannot be distinguished, on the score of principle, from the law under consideration; and if this law is to be overturned for the reasons urged against it, all the other Local Option laws of the State must fall with it.

With these remarks, I leave this branch of my argument. (*State v. Paul*, 5 R. I. 185; *State v. Kerran*, 5 R. I. 497.)

Our next position, may it please the Court, is, that if the law in question be a delegation of legislative power, the

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power delegated is a part of the police power of the State, which may be constitutionally delegated by the Legislature to local, public, or political corporations, such as counties, cities and towns. While it may not be necessary, for the purposes of this case, to question the truth of the general proposition that legislative power cannot be delegated, I do not desire to be understood to accede to it in any degree. In those cases in which the doctrine that legislative power cannot be delegated has been enunciated and sustained, it is not contended that there is any express provision in the Constitution. The argument rests, in part, upon a supposed implication, arising out of the fact that all legislative power is vested, primarily, in the Legislature, and, in part upon the idea that every Constitution has a genius, or a spirit, which Courts are at liberty to consult in cases where the letter of the Constitution is silent.

It may be regarded as now well settled, that the Courts must find all restrictions upon the exercise of legislative power, in the letter of the Constitution, and such necessary implications as arise therefrom. It would be a dangerous doctrine to establish, that every judge is at liberty to declare a law constitutional or unconstitutional, in accordance with his own notions as to what constitutes the genius and spirit of the Constitution. While such is the case, State Constitutions would become protean in form, would take different shapes, from time to time, according to the notions of their genius and spirit entertained by the Court interpreting them.

So far as the argument against the delegation of legislative power rests upon a supposed implication, arising out of the fact that all legislative power is vested in the Legislature, if it proves anything, it proves too much.

The supposed implication certainly affects all legislative power, if it affects any; and, if the argument is sound, it must establish, conclusively, the proposition that, under no circumstances, can any of the legislative power be delegated to third persons; and if it turn out on examination that this argument is unfounded in part, it must result that the implication does not exist. As

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was remarked by Judge BALDWIN, in the case of *Hobart v. The Supervisors of Butte County*, the Legislature being in possession of a great mass of political powers, may exercise them in any manner they see proper, unless restrained by some express provision or necessary implication of the Constitution. If an implication be relied on, as prohibiting a given Act of the Legislature, it must stand out clear and well-defined. This cannot be asserted of the supposed implication question. It is inconsistent with the practice of all civilized governments from time immemorial down to the present day. In England the government granted legislative powers to the East and West Indian Colonies. It did the same with her American Colonies, which have since grown up and expanded into these United States. Holland, France and Spain have done the same, and even the government of the United States itself has delegated powers; has, from the commencement, governed the people of its territories, by creating for them a form of government under what is denominated an Organic Act, and vested the departments thereof with legislative, judicial and executive powers. It may be said, upon the other side, that these grants of legislative power, from England, France and Spain, to their colonies, came from the crown, not from the law-making department of the government; and that these illustrations, therefore, are inapt, and prove too much. It is true, may it please your Honors, that they did come from the crown, and not from the law-making department; but we are to remember that under our form of government all the legislative powers of the crown and of Parliament are combined and vested in the Legislature, and the Constitution creates no distinction as between the two. Whatever the king could have done, or can do, in England, in the way of granting charters, franchises and governmental powers, the Legislature may do, upon the same terms and conditions upon which it exercises all its other powers.

There is a well-defined class of legislative powers called Police Regulations, which, so far as I have been able to discover, the right of the Legislature to delegate, no one

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has ever denied. The powers to which I refer are those which are uniformly conferred upon subordinate local governments; such as counties, towns and cities. They include the power to construct, repair and improve highways, to abate nuisances, to preserve order and quietness, to repress houses of ill fame, gambling and tippling shops. This law, if the Court please, falls clearly within this class of powers, and should your honors declare it to be a plain and palpable delegation of legislative power, it is, nevertheless, constitutional. Instead of the Constitution forbidding the delegation of police powers to local public corporations, it requires such corporations to be created by the Legislature, and the act of creation of necessity includes the delegation of such legislative powers as are generally included or classed as police powers. These powers may be delegated to the governing bodies of counties, cities or towns, or to the people at large, to be exercised in their discretion, or upon such terms and conditions as the Legislature may prescribe. From time out of mind, the power to regulate the sale of intoxicating liquors has been delegated to public corporations, to Commissioners, Selectmen and Boards of Excise; and, if it may be delegated to them, it may be delegated to the people at large; for, the right to delegate being conceded, there is certainly no constitutional restriction requiring it to be granted to governing bodies, rather than the people at large. (*The Commonwealth v. Bennett*, 108 Mass. 29; *Clark v. The City of Rochester*, 28 N. Y. 605.)

Here, if the Court please, I close my argument; but in doing so the great importance of the question and the grave interest taken by the people in it justify me, if justification be necessary, in recalling to your Honors' attention the rules which are to be followed in the solution of all constitutional questions. That this law is a popular law; that is to say, that it meets with the approval of the people of the State, is manifested by the fact, as I am informed, that out of over a hundred elections which have been held under it, those elections have gone in favor of the law, in the ratio of two and a half to one. It was said by Chatham, I think,

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when explaining a vote which he was about to give in favor of the passage of a law: "I shall vote for this law for three reasons: 1st. Because the people demand it; 2d. Because the people demand it; and, 3d. Because the people demand it."

He considered the popularity of the law as a sufficient test of its merit. Were this Court unfettered by constitutional restrictions, it might well say, in the language of Chatham, "We will sustain this law, because the people demand it." So, if the Court please, it well becomes us to refer, as already suggested, to the rule governing the consideration of constitutional questions. I understand the rule to be this, and I understand that there is no difference of opinion in regard to it — that Courts must always sustain the validity of a law, unless it violates some provision of the Constitution, plainly, palpably and beyond all reasonable doubt. In other words, every reasonable doubt as to its validity must be resolved in favor of the law. Chief Justice BLACK, one of the most eminent of American Judges, in that clear, terse and pointed manner for which he was remarkable, in the great case of *Sharpless v. The Mayor, etc.* (9 Harris, 164), thus declares the rule:

"We can declare an Act of the Assembly void only when it violates the Constitution clearly, palpably, plainly, and in such a manner as to leave no doubt or hesitation in our minds."

I have often thought, may it please your Honors, that there ought to be inserted in every Constitution a provision that no law of the Legislature should be overturned or declared null and void by any Court, except upon the unanimous concurrence of all its members. It is a most delicate thing for a Court to undertake to override the will of a coördinate branch of the government. Nowhere, except in America, is such power conferred upon the Judiciary. We look in vain through the judicial decisions of England for any discussion of constitutional law. Parliament is the sole judge of what is the Constitution of England.

While the rule is otherwise in America, it should never be forgotten that the Judiciary Committees of our legis-

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lative bodies are composed, in a great measure, of lawyers, sometimes as eminent, and even more so, than those who preside in our Courts, and that their opinion of the constitutionality of the law is entitled to great weight.

I have often thought that the opinion of the Legislature has not always received the consideration to which it was entitled; and when, as is frequently the case, a Court is divided upon the constitutionality of the law, a bare majority being opposed to the law, a reasonable doubt may be said to exist, and the judgment of the Legislature should be allowed to turn the scale the other way.

L. Baldwin, also for the People, reviewed the authorities cited by counsel, in an elaborate argument.

By the Court, **McKINSTRY, J.:**

Under the Act of March 18, 1874, "To permit the voters of every township or incorporated city to vote on the question of granting licenses to sell intoxicating liquors," an election was held in the Fourth Township of Contra Costa County, at which a majority of the votes were cast "against license."

The petitioner was afterward convicted of an alleged violation of the law, as declared by the statute, and sentenced to imprisonment in the county jail.

The power to make laws conferred by the Constitution on the Legislature cannot be delegated by the Legislature to the people of the State, or to any portion of the people. (*Houghton v. Austin*, 47 Cal. 646; *Barto v. Himrod*, 8 N. Y. 483; *Bank of Rome v. Village of Rome*, 18 N. Y. 38; *Starin v. The Town of Genoa*, 23 N. Y. 429; *Clark v. The City of Rochester*, 28 N. Y. 605; *Thorn v. Cramer*, 15 Barb. 112; *Bradley v. Baxter*, Id. 122; *Parker v. Commonwealth*, 6 Penn. St. 507; *Commonwealth v. Quarter Sessions*, 8 Penn. St. 391; *Locke's Appeal*, 72 Penn. St. 491; *State v. Wilcox*, 45 Mo. 459; *Rice v. Foster*, 4 Harr. 479; *State v. Copeland*, 3 R. I. 38; *R. R. Co. v. Commissioners of Clinton County*, 1 Ohio, N. S. 77; *People v. Collins*, 3 Mich. 343; *Santo v. State*, 2 Iowa, (Clarke) 165; *Geebrick v. State*, 5 Iowa, 491; *State v. Beneke*, 9 Iowa, 203; *State v. Weir*, 33 Iowa, 134;

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Maize v. State, 4 Ind. 342; *Meshmeier v. State*, 11 Ind. 482; *State v. Swisher*, 17 Tex. 441; *State v. Panker*, 26 Vt. 362.)

Our government is a representative republic, not a simple democracy. Whenever it shall be transformed into the latter — as we are taught by the examples of history — the tyranny of a changeable majority will soon drive honest men to seek refuge beneath the despotism of a single ruler. To become a law an act must be passed through both Houses of the Legislature, be signed by the President of the Senate, and Speaker of the Assembly, and be approved by the Governor; or, if vetoed by the Executive, must again be passed by the constitutional majority. Thus, and thus only, can a general statute be enacted.

While the power and responsibility of legislation remain where the Constitution has placed them, a proposed measure, before it can become a law, must pass through the ordeal of a public and deliberate discussion in the Legislature. "Public opinion will prevail; but it will be enlightened, deliberate, permanent, and organically expressed public opinion. It is this opinion alone which the Constitution designed should govern. Such a government secures deliberation and responsibility in legislation, and affords protection against the despotism of official rulers on the one hand, and of irresponsible numerical majorities on the other. It has been appropriately termed 'the flower of modern civilization.'" (*People v. Collins*, 3 Mich. 416.)

It is urged, however, that for the Legislature to enact that a law shall take effect, provided the people of the State, or of a district, shall vote in favor of it, is not to delegate the law-making power. This position has been upheld by Courts of high character, but I think the decisions in which it has been denied are sustained by the better reasons.

It is true a statute may be conditional; its taking effect may sometimes be made to depend upon a subsequent event. The last proposition is illustrated by the case of *The Cargo of the Brig Aurora v. United States*, 7 Cranch. 382, in which the validity of a provision of the "non-inter-

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course law" was upheld. The provision was to the effect that in case Great Britain or France should revoke or modify its edicts previously issued, so that they should cease to violate the neutral commerce of the United States, the trade suspended by the law should be renewed. It will be observed that in this instance the members of Congress exercised their own judgment, and simply determined that trade should be suspended, while the orders in council or edicts should continue.

But it does not follow that a statute may be made to take effect upon the happening of any subsequent event which may be named in it. The event must be one which shall produce such a change of circumstances as that the law-makers—in the exercise of their own judgment—can declare it to be wise and expedient that the law shall take effect when the event shall occur. The Legislature cannot transfer to others the responsibility of deciding what legislation is expedient and proper, with reference either to present conditions or future contingencies. To say that the legislators may deem a law to be expedient, provided the people shall deem it expedient, is to suggest an abandonment of the legislative function by those to whose wisdom and patriotism the Constitution has intrusted the prerogative of determining whether a law is or is not expedient. Can it be said in such case that any member of the Legislature declares the prohibition or enactment to be expedient?

A statute to take effect upon a subsequent event, when it comes from the hands of the Legislature, must be a law *in presenti* to take effect *in futuro*. On the question of the expediency of the law, the Legislature must exercise its own judgment definitely and finally. If it can be made to take effect on the occurrence of an event, the Legislature must declare the law expedient if the event shall happen, but inexpedient if it shall not happen. They can appeal to no other man or men to judge for them in relation to its present or future propriety or necessity; they must exercise that power themselves, and thus perform the duty imposed upon them by the Constitution. But in case of a law to take effect, if it shall be approved by a popular vote, no

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event affecting the expediency of the law is expected to happen. The expediency or wisdom of the law, abstractly considered, does not depend on a vote of the people. If it is unwise before the vote is taken, it is equally unwise afterward. The Legislature has no more right to refer such a question to the whole people than to a single individual. The people are sovereign, but their sovereignty must be exercised in the mode pointed out by the Constitution. (*Barto v. Himrod*, 8 N. Y. 483; *Rice v. Foster*, 4 Harr. 479.)

It was argued that the general statute which prohibits the sale of intoxicating liquors without license and the "Local Option" statute should be read as one law, and so reading them, that it is not left to the popular vote to give effect to the law, but only to determine whether licenses shall be issued under the law. This distinction seems to have been recognized by the Supreme Court of New Jersey in *State v. Morris Common Pleas*, (November, 1872). There a statute was sustained which, in itself, contained a prohibition of sales without license, and then left to the people in town meeting, to say whether licenses should be granted. The Supreme Court of that State, after stating the test to be whether the enactment, when it passed from the hands of the law-givers, had taken the form of a complete law, said: "It (the statute), denounces as a misdemeanor, the selling of liquor without license; so far it is positive and free from any contingency; it is left to the popular vote to determine; not whether it should be lawful to sell without license, but whether the contingency should arise under which licenses should be granted." The New Jersey statute left the option whether licenses should or should not be granted to the people in "town meeting." The difference between the action of towns, as local governments, and a submission to the voters living in any merely territorial subdivision of a county, will be hereinafter pointed out. I do not think, however, that the distinction asserted by the Supreme Court of New Jersey, can be maintained. A law being in operation authorizing the business of retailing liquors, provided a license be first obtained, the Legisla-

ture enacts that the people of a town shall determine whether any license shall be granted. If they determine that licenses shall not be granted, none can be issued.

It is plain in such case that the law-makers do not intend to establish the new rule, until it shall have other sanction and allowance than that of the Legislature itself. Licenses were granted by authority of the old law; they can be prohibited only by a new law. But in the case supposed, the Legislature does not determine that licenses shall not be granted, but leaves it to the popular vote to determine the very contingency which the Legislature must determine for themselves, in order to give effect to the law.

It is certain that the sections of the General Revenue law relating to licenses to vendors of liquors, remain in force until the vote is counted and announced, as required by the statute; it is equally certain (if the statute is valid,) that these sections cease to have force from the time the vote is announced, if the majority is against license. By whom, in such case, are the provisions of the Revenue law repealed or suspended — by the Legislature or by the people of the town?

And we are thus brought to another question: Can this law be sustained as in effect conferring on "towns" the power of regulating within their limits the sale of intoxicating liquors?

In determining this question, I do not deem it necessary to decide any of the following:

1. Can the officers of a city or town be empowered to regulate the sale of intoxicating liquors; and, if so, can they prohibit the sale in certain quantities under the power to regulate it?

2. Can a city or town by ordinance or by-law, make that a criminal offense which is legalized by the general laws of the State?

3. Does an Act of the Legislature authorizing a by-law, the effect of which is to relieve those making sales of more than five gallons, within the town, from the payment of a license-tax, which those engaged in the same business out-

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side of the town are obliged to pay, violate the provision of the Constitution: "All laws of a general nature must have a uniform operation?"

4. Would a law be unconstitutional which conferred a power upon the officers of a county or town, to be exercised at the option of the officers, provided the people of the county or town should vote in favor of the exercise of the power by the officers?

It is enough to say that this statute cannot be sustained as conferring on the towns the power referred to, because no "towns" have ever been created in this State.

Our Constitution, in terms, makes it the imperative duty of the Legislature to create certain local governments. "The Legislature shall establish a system of county and town governments, which shall be as nearly uniform as practicable throughout the State." (Art. XI. Sec. 4.) "It shall be the duty of the Legislature to provide for the organization of cities and incorporated villages," etc. (Art. IV., Sec. 37.) The behest of the Constitution as to "towns" will be obeyed when a system of town governments shall be established by law. When the system shall be established, the towns may make such local rules or by-laws as they shall be authorized to make by the statutes which shall give them life and entity. The bestowal on them of the power to make proper local rules or by-laws, will not be a delegation of legislative power conferred on the Senate and Assembly, because, as was said in *Houghton v. Austin*, *supra*, the exercise of such power by the counties, towns, cities and incorporated villages, is recognized by the same Constitution which confers the general legislative power upon the State Legislature.

But the Constitution is not self-executing; the town governments must be created by statute. And it will be observed, the Constitution commands the Legislature to establish a system of town governments. This form of expression conveyed a definite meaning, when the Constitution was adopted, and is at once understood by those familiar with the systems of town government elsewhere; it would be meaningless, unless applied with reference to

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organizations, in their general features at least, like those in other States, where systems of town government had been established. To establish a system of government, the duties of the several local officials must be defined, in some of whom (or in the inhabitants of the town acting in a public capacity) a discretionary action must be vested within the scope of the powers given by the organic law which creates the system. In view of the origin of towns and their history in other States, I can conceive of no system of town government which is not continuous; which does not furnish officers to whom is given (during their term of office) the management of the machinery of local government, and which does not provide a legislative assembly, whose enactments shall be the product of deliberation and mutual consultation. This last seems the very life of any such system heretofore known in the United States. If the subjects of local legislation are committed to the people of the town, they must be committed to them as to a deliberative body; a project for a local regulation must be submitted to the wisdom and discretion of the people in organized assembly, by whom, after proper discussion and consideration, it may be rejected, or molded into a rule to be enforced as law. In our country, the idea of legislation — in its broader sense, or as applied to local concerns — involves an examination into the merits of a proposed law by the assembled legislators. Under the system of town governments in New England, it has been the practice (by notice designating the questions to be presented), for the Selectmen to call meetings of the voters of the town — which are presided over by a moderator, and restrained by rules intended to secure orderly proceedings — at which the propriety and expediency of proposed measures may be considered, adopted or rejected. The voters of the town are supposed to be so few in number, that they may act directly on matters of local concern, but they act as a subordinate, legislative and deliberative body, in every sense that their representatives would so act, if representatives were selected by them. The matters of local interest are discussed in the town meeting, before they are passed upon.

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“The marked and characteristic distinction,” says Chief Justice SHAW, in *Warren v. Charlestown*, “between a town organization and that of a city is, that in the former all the qualified voters meet, deliberate, act and vote; whereas, under a city government, this is all done by their representatives.” (2 Gray, 84-101.) Mr. Quincy, in his “Municipal History of Boston” (p. 28) in explaining the causes which led to the establishment of a city government for Boston, while he proves that the town government had outlived its usefulness, shows that before the city was incorporated all the qualified electors constituted the local Legislature. He says: “With a population upwards of forty thousand, and with seven thousand qualified voters, it was evidently impossible calmly to deliberate and act. When a town meeting was held on any exciting subject in Faneuil Hall, those only who obtained places near the moderator could even hear the discussion.”

The system of town governments, as it existed in New York prior to 1846, is fully explained in the eleventh chapter of the first part of the revised statutes of 1827-8. There, as in New England, the towns possessed certain of the faculties of a body corporate; could sue and be sued, hold lands and make contracts necessary to the exercise of their corporate powers. In New York, as elsewhere, the citizens of towns chose certain town officers, and when assembled as a deliberative body (Justices of the Peace presiding), made “prudential rules and regulations,” with respect to local matters committed to their discretion. In some other States this power would seem to have been vested in Boards of Trustees who constituted the local parliaments.

The Legislature of California has never established a “system of town governments.” The word “town” is nowhere used in the statutes in the sense in which it is employed in the Constitution. The Supervisors are authorized (Political Code, Sec. 4,046) to divide the counties into “townships,” as they are authorized to divide them into election, school, road, and supervisorial districts; but the territory included in any one of the districts last named

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need not be the same as that included within the limits of a township. No township governments have been established. The only officers mentioned in the general laws as township officers are Justices of the Peace and Constables. The townships have neither been given personality nor any other of the attributes of a corporation; no official has been named empowered to call the inhabitants or voters together for the purposes of consultation and joint action; no Act has been passed providing for any presiding officer, or regulating the mode of conducting business, or of declaring the result of the action of the inhabitants or voters when assembled; and neither the voters themselves, nor any boards of officers elected by the voters have ever been constituted a deliberative assembly for the purpose of adopting prudential rules or regulations in respect to matters placed under the control of the town governments.

The exercise by the town governments, when they shall be established, of the powers to make local rules will co-exist with the power of the State Legislature to make general laws, and will apparently (but apparently only) constitute an exception to the rule, that the power to make laws, placed by the Constitution in the Senate and Assembly cannot be delegated. When the mandate of the Constitution shall have been obeyed, and a "system of town governments" shall have been established, and when local legislatures shall have been organized under that system, the State Legislature may confide to members of such local legislatures the task of deliberating and acting upon matters purely local in their nature. The Legislature may give to the town governments, when formed, the right to make local rules; but the Legislature has no more right to delegate to the people living within certain territorial limits, but who have no distinctive political character or governmental organization, the power to make laws, than it can delegate the same power to all the people of the State.

The statute of March 18, 1874, under the provisions of which the petitioner was convicted, does not itself establish any system of town government. The only officers who are

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directed to perform any acts are county officers; the election is to be ordered by and the returns made to the Supervisors. There is no provision for an assemblage of the people of the town for deliberation; the vote to be taken can in no way be said to express the result of such deliberation. The Constitution intended that the opinion of a majority should govern as to town matters, but that it should be an "organically expressed" opinion. The power to enact laws must be employed by the State Legislature; that to make by-laws for a town by the local Legislature; to become law or by-law, it must first be considered by the appropriate deliberative body. The statute under consideration simply permits a species of *plebiscitum* with reference to a particular subject, in which the only option of the people of a township is to say "yes" or "no" to a complicated project. After this spasmodic effort at the polls, the "town government" (if this can be called one) subsides into inaction, without any form or power of self-vitalization, until again aroused to the exertion of its single function by the Supervisors of the county. This statute furnishes neither a system nor a government.

When M. de Tocqueville and other writers, who have studied our institutions in a philosophical spirit, have expressed their admiration for the system of town governments existing in New England, as affording an excellent school of preparation for the discharge by the citizen of his duties to the State, it was in view of the public discussions in reference to affairs of local, but sometimes absorbing interest, at which all the qualified inhabitants of the town could be present, and in which all were authorized to take part. To substitute for such local legislation, where measures receive the sanction of law only after public interchange of opinions, the machinery of a "primary election" would be to degrade the whole system. That cannot be called a system of town government in which no deliberative assemblage is provided for, and in which a local law is adopted by the ballots of perhaps a bare majority, who vote secretly, and without consultation with the rest of the voters; who are actuated by motives which need not be

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publicly avowed, or controlled by reasons the weakness of which would be exposed by a public discussion.

I think, therefore, first—This statute is void, because it did not become a law when it left the hands of the Legislature, but was to take effect only when it should be approved by a majority of the people of a township, and then only in the township where thus approved. Second—That this statute is not a law conferring upon towns any governmental or police powers.

Let the petitioner be discharged.

Mr. Justice RHODES and Mr. Justice CROCKETT dissented.

NOTE.—It is to be understood that the necessities of this case do not demand of the Court to determine what powers may be granted to the towns. It may be difficult, perhaps impracticable, to draw the line by general definition; but it is certain that all the powers of legislation cannot be conferred on the counties or towns. As was said by DOUGLAS, J., in *The People v. Collins*, 3 Mich. 415, “only powers of legislation over matters of local concern can be delegated. If the Legislature should attempt to invest the Boards of Supervisors with power to enact the entire Civil and Criminal Codes which should be in force within their respective counties, this would be manifestly in violation of the true intent and spirit of the Constitution.”

It would be an entire abandonment by the Legislature of the power to pass general laws, and would be destructive of our government; resolving the State into petty districts, or communes, each with different laws, to be enforced only within its own borders.

[No. 10,048.]

THE PEOPLE v. ROBERT CAGE.

WHEN PERSON ACCUSED OF CRIME IS "IN JEOPARDY."—When a person is placed on trial upon a valid indictment, before a competent Court and

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a jury, he is in jeopardy within the meaning of the constitutional provision which declares that "no person shall be subject to be twice put in jeopardy for the same offense."

IDEM.— In such case, the discharge of the jury without verdict, unless by consent of the defendant, or from some unavoidable accident or necessity, is equivalent to an acquittal.

IDEM.— Among these unavoidable necessities are the inability of the jury to agree after a reasonable time for deliberation and the close of the term of the Court.

DISCHARGE OF JURY IN CRIMINAL CASE.— The discretion of the Court in the discharge of a jury for inability to agree must be exercised upon some kind of evidence, and the judgment of the Court on the point should be expressed in some form upon the record.

IDEM.— A report made by the Sheriff to the Court that the jury say they are unable to agree, is not evidence upon which the Court can act in discharging the jury for inability to agree. The proper course is to call the jury into Court, and have them announce their inability in the presence of the Court.

WHEN DISCHARGE OF JURY AMOUNTS TO AN ACQUITTAL.— If, while a jury is out deliberating upon their verdict in a criminal case, and before the expiration of the term, the Judge, without calling the jury into Court, adjourns the Court for the term, it is equivalent to an acquittal of the defendant.

DEFENSE UNDER PLEA OF NOT GUILTY.— An acquittal of a defendant in a criminal case by a discharge of the trial jury without a verdict, may be given in evidence on a subsequent trial of the defendant, under a plea of not guilty.

APPEAL from the District Court, Seventeenth Judicial District, Los Angeles County.

The defendant appealed.

The other facts are stated in the opinion.

Kewen & Howard, for Appellant, argued that the defendant had been in "jeopardy" at the first trial within the meaning of the words as found in article five of the Amendments to the Constitution of the United States, and section eight of article one of the Constitution of this State; and cited *Com. v. Cook*, 6 Serjt. & R. 595; Bishop's Crim. Law, vol. 1, secs. 856, 858, 859 and 870; *People v. Webb*, 38 Cal. 477; and that the defendant, having been in jeopardy, was acquitted; and cited *State v. Ephraim*, 2 Dev. & Bat. 162; *State ex rel. Battle*, 7 Ala. N. S.; Bishop's Crim. Law, Sec. 878, *The Williams Case*, 2 Gratt. 567. They also argued

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that, under section one thousand and sixteen of the Penal Code. The proceedings on the former trial should have been received in evidence under the plea of not guilty.

John L. Love, Attorney-General, for the People, argued that the information given by the Sheriff to the Court, was evidence upon which the Court could act; as he was an officer of the Court who had charge of the jury, and whose duty it was to ask them if they had agreed on their verdict; and cited *Com. v. Olds*, 5 Littell, Ky. 137; *Dobbins v. The State*, 14 Ohio, 493; and *Charlotte Winsor v. The Queen*, 1 Q. B. 289. He also argued that the Penal Code did not make it the duty of the Court to enter upon its minutes the reasons which controlled it in discharging a jury, and cited Penal Code, Secs. 1139 and 1140.

By the Court, NILES, J.:

The defendant was tried and convicted in the District Court for the County of Los Angeles, in the month of April, 1873, of the crime of murder in the first degree. The leading question made upon the appeal relates to the legal effect of the proceedings had at a formal trial of the cause in the same Court, at the June term, 1872. These proceedings, as shown by the Bill of Exceptions, were as follows: The case was regularly brought on for trial at that term. A jury was duly empaneled and sworn; evidence was introduced, and the case was submitted to the jury on the 30th of July. The jury remained together until the evening of the 2d of August. The proceedings of that day, so far as they pertain to the question before us, are shown by the following extract from the minutes of the Court:

“In this cause, counsel for the defense having been called and appearing, (counsel for plaintiff failing to answer,) in open Court, the Court ordered the Sheriff to proceed to the door of the jury-room where the jury in this case were under deliberation, and inquire of them if they had agreed upon a verdict, to which they replied that they ‘had not, and could not agree on a verdict,’ and the Sheriff

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thereupon reported their said reply to the Court. Whereupon the Court was ordered to be adjourned for the term and the same was accordingly done by the Sheriff."

The term would not have expired by operation of law until the evening of the ensuing day.

The defendant's counsel offered to prove the foregoing facts in support of a motion for a judgment of acquittal and discharge, made at the time the defendant was put upon his second trial. The motion having been denied, the defendant's counsel tendered a plea reciting substantially the same facts, which plea the Court refused to accept. At the trial the defendant offered to prove the same facts under the plea of not guilty, and the testimony was excluded by the Court.

There is no doubt as to the general rule that whenever a person has been placed upon trial, upon a valid indictment, before a competent Court, and a jury empaneled, sworn and charged with the case, he is then in jeopardy within the meaning of the constitutional provision which declares that "no person shall be subject to be twice put in jeopardy for the same offense;" and that the discharge of the jury without verdict, unless by consent of the defendant, or from some unavoidable accident or necessity, is equivalent to an acquittal. Among these unavoidable necessities are recognized the inability of the jury to agree after a reasonable time for deliberation, and the close of the term of the Court. Unquestionably this defendant was placed in jeopardy at the first trial, and is entitled to the protection of the constitutional provision, unless one or the other of these necessities existed.

1. The power of the Court to discharge a jury by reason of their inability to agree upon a verdict, is undisputed. It was so held in the case of *Ex parte McLaughlin*, (41 Cal. 212.) But it was also held that "it must be exercised in accordance with established legal rules, and sound legal discretion in the application of such rules to the facts and circumstances of each particular case." It is evident that in a matter so gravely affecting the life or liberty of the accused, the discretion of the Court should be exercised

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upon some kind of evidence, and its judgment should be expressed in some form upon the record. In this case there was no evidence upon which the Court was authorized to act, and no apparent adjudication. The Sheriff was ordered "to proceed to the door of the jury-room and inquire of them if they had agreed upon a verdict." The extent of his official duty was to receive their reply to this question, and report it to the Court.

His report of the further answer of the jury that they "could not agree on a verdict," was extra official, and was no evidence whatever upon which the Court could act. If the jury were in fact unable to agree, they should have been called into Court, and have announced their inability in the presence of the Court and of the defendant. In the absence of this, or some equivalent showing, the Court was not authorized to make an order of discharge upon this ground.

Nor was there any adjudication whatever upon this subject. It does not appear to have been determined by the Court in any way that the jury were unable to agree. There was no order of discharge of the jury, other than that resulting from the adjournment of the Court for the term. There is nothing in the case to show the existence of that inability to agree, which has been held to constitute that necessity which authorizes a discharge of a jury before verdict, and deprives the accused of his exemption from a second trial.

2. There is no doubt that the adjournment of the Court for the term operated to discharge the jury. That effect is given to a final adjournment by section four hundred and thirteen of the Criminal Practice Act, under which this trial was had. Nor can there be any doubt of the power of the Court to adjourn finally before the expiration of the term limited by statute for its continuance. But it is claimed by the counsel for appellant that there was in this case no such legal necessity for the adjournment, and the consequent discharge of the jury, as would prevent him from insisting upon his former jeopardy, in bar of a second trial. And in this we agree with the counsel.

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Whenever the time fixed by law for the expiration of a term arrives, the powers of the Court for that term are at an end by operation of law, and the powers of the jury must terminate with those of the Court to which it was attached. Here the legal necessity for the discharge is apparent, and has been frequently recognized by the Courts. It is placed upon the same footing as a discharge occasioned by the illness or death of a jurymen or of the judge. But there is, presumably, no necessity for the final adjournment of the Court before the fixed limit of the term is reached. If such an adjournment is had pending the trial of a criminal cause, the necessity must exist and should appear, in order to rebut the presumption of jeopardy arising from the fact of the trial. If this were otherwise, the Court might be adjourned immediately after the jury had retired from the box, and before an agreement was possible. The right which the Constitution intends to assure to the accused, when put upon trial—to either have a verdict rendered in his case, or go free—would be made to depend upon the arbitrary discretion of the judge.

Mr Bishop, in his work upon criminal law, after an exhaustive review of the authorities, and a discussion of the whole subject, arrives at these conclusions: "Whenever, after a trial has commenced, whether for misdemeanor or for felony, the Judge discovers any imperfection which will render a verdict against the defendant either void or voidable by him, he may stop the trial, and what has been done will be no impediment in the way of any future proceedings. Whenever, also, anything appears showing plainly that a verdict cannot be reached within the time assigned by law for the holding of the Court, he may adjudge this fact to exist, and on making the adjudication matter of record, stop the trial, with the like result as before. But without the adjudication, the stopping of the trial operates to discharge the prisoner. In other words, when the record shows the defendant to have been in actual jeopardy, he is protected thereby from further peril for the same alleged offense. But when it shows also, in addition to this, something which disproves the peril, it does not show the

Wallace, C. J., dissenting.

peril, whatever else it shows, and, therefore, it does not protect him." (1 Bish. Cr. Law, Section 873.)

These views are fully justified by the authorities cited in their support, and the conclusions cannot well be avoided. We are of the opinion that the discharge of the jury at the first trial of this cause was equivalent to a verdict of acquittal, and it only remains to determine in what manner the defendant should be permitted to avail himself of the right.

By section one thousand and sixteen of the Penal Code, three kinds of pleas to an indictment are provided for: First, guilty; second, not guilty; third, a former judgment of acquittal, or conviction of the offense charged. The defense that the defendant has been before in jeopardy, if it be, as we hold, sufficient, must be taken advantage of under one or the other of these pleas. It would seem that the more convenient method of interposing a defense of this nature would be by a plea analogous to a plea of former acquittal, of which it is said to be the equivalent. But we find no authority in the statute for a plea of this kind. The case falls rather within the purview of section one thousand and twenty of the Penal Code, which declares that "all matters of fact tending to establish a defense, other than that specified in the third subdivision of section one thousand and sixteen, may be given in evidence under the plea of not guilty." We hold, that under the plea of not guilty, the evidence of the facts attending the first trial, as disclosed by the record, should have been received. For the error of the Court in rejecting this evidence, the judgment must be reversed, and the cause remanded for a new trial; and it is so ordered.

WALLACE, C. J., dissenting:

The former trial of this cause took place in June, 1872, and the case was given to the jury on the 30th of July, and on the same day they returned into Court for further instructions, which, being given, they again retired to deliberate upon their verdict; but on the same day re-ap-

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peared in Court and stated their inability to agree upon a verdict, but the Court then declined to discharge them. Their deliberations continued during the 31st day of July, and until the first day of August, on which day they again appeared in Court and announced to the Court that they could not agree upon a verdict, and that they saw no chance for an agreement. The Court offered to repeat to them the instructions already given, but they, not desiring to again hear the instructions, were again sent out for further deliberations. On August 2d, it having been reported to the Court that one of the jurors was too ill to serve further, the jury were again brought into Court, when, it appearing that the indisposition of the juror was not of a serious character, the jury were again sent out for further deliberation. At 7:20 P. M. of the same day, the jury, not having returned a verdict, the Court sent the Sheriff to enquire of them if they had yet agreed upon a verdict, and that officer reported to the Court, that the jury "had not and could not agree on a verdict." Upon the receipt of this information the Court was adjourned for the term, which adjournment, of course, operated a discharge of the jury. Undoubtedly it would have been better practice to have called the jury into open Court, and there discharged them in the due and usual form of law; and had that been done, and had the Court entered it of record that they were discharged, because of their inability to agree upon a verdict, I do not understand that, in the view of my associates, such a discharge would have operated as a bar to further proceedings on the indictment by the empaneling of another trial jury, for the jury had deliberated of their verdict from the 30th of July to the 2d of August, inclusive some four days in all. Their discharge under such circumstances, if regularly made and entered of record, could not have been rightfully complained of by the prisoner, nor would it have operated to free him from further prosecution before another jury thereafter.

If, then, upon these facts actually transpiring at the first trial, and which were then entered and now appear of record,

Points decided.

the District Court would have been justified in discharging the jury by an order entered in due form, I think that the prisoner cannot allege jeopardy merely because of the irregular manner in which the discharge of the jury was effected in this case. The substance of the whole proceeding is, in short, that it distinctly appeared to the District Court that the jury had not agreed after some four days actual deliberation; and it further appeared that at the time of the discharge of the jury there was no probability of their agreeing; and I am of opinion that an order made under these circumstances, which operated their discharge, must be considered to have been made (even though not so expressed in form) because of their ascertained inability to agree upon a verdict, and that, upon settled principles of law, a discharge of the jury under such circumstances should not operate an acquittal of the prisoner.

I must, therefore, dissent from the opinion of my associates upon this point.

The foregoing opinions were delivered at the January term, 1874. A rehearing was granted, and, at the July term, 1874, the following opinion was delivered:

By the Court, NILES, J.:

Upon rehearing, we are satisfied with the views expressed in the former opinion in this case, and the order then made will stand as the judgment of the Court.

Mr. Chief Justice WALLACE delivered the following dissenting opinion, in which Mr. Justice RHODES concurred:

I dissent from the judgment of the majority, for the reasons given in my dissenting opinion heretofore filed in this case.

[No. 10,102.]

THE PEOPLE v. ANTONE HUNCKELER.

BEING TWICE IN JEOPARDY FOR A CRIME.—If a person is indicted for manslaughter, and on his trial, the Court, without the consent of the

Statement of Facts.

defendant, discharges the jury because it is of opinion that the evidence shows that the defendant is guilty of murder, and the defendant is again indicted for murder for the same killing, he is "twice put in jeopardy for the same offense," and is entitled to an acquittal.

APPEAL from the District Court, Twelfth Judicial District, City and County of San Francisco.

The defendant was indicted on the 10th day of February, 1874, for murder, alleged to have been committed by killing Catherine Erni, at the City and County of San Francisco, on the 17th day of September, 1873. The defendant, when arraigned, pleaded a former acquittal, former jeopardy, and not guilty. On the trial it was shown that, on the 15th day of December, 1873, the defendant was arraigned in said Court on an indictment charging him with the crime of manslaughter, committed by having killed said Catherine, and pleaded not guilty. That, on the day of January, 1874, he was placed upon his trial for manslaughter, before a jury duly empaneled, and sworn, and that, after the witnesses for the prosecution and defense had been sworn and examined, the Court, without the consent of the defendant, on motion of the District Attorney, dismissed the jury, and remanded the defendant to the custody of the Sheriff, so that an indictment might be found for a higher crime. The indictment on which the judgment was rendered from which this appeal was taken was afterwards found. On the second trial, the defendant asked the Court to instruct the jury that, if they found that the defendant had been formerly indicted for manslaughter committed by killing Catherine Erni, and had been placed on his trial before a jury duly empaneled and sworn, and that the Court had discharged the jury without a verdict, without the consent of the defendant, in order that an indictment might be found against him for a higher crime, that they should acquit the defendant. The Court refused to give the instruction.

Section one thousand one hundred and twelve of the Penal Code reads: "If it appears by the testimony that the facts proved constitute an offense of a higher nature than

Argument for Appellant.

that charged in the indictment, the Court may direct the jury to be discharged, and all proceedings on the indictment to be suspended, and may order the defendant to be committed or continued on, or admitted to bail to answer any indictment which may be found against him for the higher offense. If an indictment for the higher offense is found by the grand jury empaneled within a year next thereafter, he must be tried thereon, and a plea of a former acquittal, to such last found indictment is not sustained by the fact of the discharge of the jury on the first indictment."

Section one thousand and twenty-one reads: "If the defendant was formerly acquitted on the ground of variance between the indictment and the proof, or the indictment was dismissed upon an objection to its form or substance, or in order to hold the defendant for a higher offense, without a judgment of acquittal, it is not an acquittal of the same offense." The motion of the District Attorney to dismiss the jury was based on these sections.

The defendant was convicted of manslaughter and appealed.

John H. Dickenson, for the Appellant, argued that sections one thousand one hundred and twelve and one thousand and twenty-one of the Penal Code were in conflict with section eight, article one, of the Constitution of this State; and cited, *People v. Coleman*, 4 Cal. 46; *Ex. Parte Hoffman*, 44 Cal. 35; *People v. Olwell*, 28 Cal. 460; *People v. Webb*, 88 Cal. 467; *Cooley's Cons. Lim.* 325; *People v. Cage*, ante p. 323; *M. S. v. Keene*, 1 McLean, 431; 3 Coke's Lit. 538; 1 Bish. Cr. Law, 1030 and 1040; Wharton's Cr. Law, Secs. 577 to 587, and *People v. Goodwin*, 18 Johns. 203.

O. B. Darwin, also for the Appellant, argued that section one thousand one hundred and twelve of the Penal Code should be so construed as to make the crime "of a higher degree," mean a crime of a different nature.

T. P. Ryan, for the People.

Opinion of the Court — McKINSTRY, J.

By the Court, McKINSTRY, J.:

“No person shall be subject to be twice put in jeopardy for the same offense.” (Const. Art. I, Sec. 8.)

This language is more than the equivalent of “no person shall be twice tried for the same offense.” (1 Bishop, Cr. L. 1018, 5th ed.) A defendant is placed in apparent jeopardy when he is placed on trial before a competent Court and a jury empaneled and sworn. His jeopardy is real, unless it shall subsequently appear that a verdict could never have been rendered by reason of the death or illness of the Judge or a jurymen, or that after due deliberation the jury could not agree, or by reason of some other like overruling necessity which compels their discharge without the consent of the defendant. (*People v. Webb*, 38 Cal. 467, and cases there cited.) And when a person has been placed in actual jeopardy, the jeopardy cannot be repeated without his consent, whatever statute may exist on the subject. (1 Bishop Cr. L. 1,206, 5th ed.) Once in actual jeopardy, a defendant becomes entitled to a verdict which may constitute a bar to a new prosecution; and he cannot be deprived of his right to a verdict by *nolle prosequi* entered by the prosecuting officer, or by a discharge of the jury, and continuance of the cause. (Cooley Const. Lim. 327.)

A person cannot be twice placed in jeopardy for the same offense; but, in the cases to which we have referred, the happening of the subsequent event which renders the discharge of the jury necessary, shows that the defendant has never been in actual jeopardy.

In the case before us, however, it is not pretended that a verdict could not have been rendered at the first trial. The mere opinion of the District Judge that the evidence showed the defendant to be guilty of a higher degree of crime, was not such a necessity as required the discharge of the jury, or authorized a re-trial of the defendant for the same offense.

Judgment reversed and cause remanded, with direction to discharge the defendant.

Mr. Justice RHODES did not express an opinion.

Statement of Facts.

[No. 10,086.]

THE PEOPLE v. ROBERT MANNING.

REVIEW OF EVIDENCE IN CRIMINAL CASE.—The Supreme Court will not disturb a judgment in a criminal case on the ground that the evidence was insufficient to justify the verdict, unless there is either a total deficiency of evidence, or it preponderates so greatly against the verdict as to render it clear that the jury must have acted under the influence of passion or prejudice.

PROOF OF VENUE OF CRIME.—Even if no witness testifies in so many words to the venue of the crime, as alleged in the indictment; yet, if the whole testimony taken together leaves no room for a reasonable doubt on this point, the venue is sufficiently proved.

OBJECTION TO EVIDENCE.—If a witness, on cross-examination, is asked if he was not arrested for vagrancy, an objection that the record is the best evidence is not tenable; for an arrest does not necessarily imply that there was any record.

IMMATERIAL AND INCOMPETENT EVIDENCE.—There is a wide distinction between immaterial and incompetent evidence. Evidence may be material and tend to prove an issue, but incompetent under the rules of law for that purpose.

IDEM.—An objection that evidence is immaterial, does not raise the point whether it was competent and admissible to impeach the witness, or competent to go to his credibility.

OBJECTION TO EVIDENCE.—A party objecting to evidence, must specify the ground of his objection, and waives all objections not so specified.

APPEAL from the District Court, Fifteenth Judicial District, City and County of San Francisco.

The murder was alleged to have been committed in the City and County of San Francisco, on the 28th day of May, 1873. The deceased was killed on Clay street, near the corner of Pike. No witness testified in words that the place of killing was in the City and County of San Francisco. Several witnesses were sworn for the prosecution. It appeared from the testimony of the witnesses that the killing was on the north side of Clay street, and between Dupont and Stockton streets, and that Dupont and Stockton streets were in the City and County of San Francisco. It was also proved that Washington and Sacramento streets were in the City and County of San Francisco, and that Clay street lay between them, so that the four streets bounding the place of killing, were in said City and County.

Opinion of the Court — Crockett, J.

• The other facts are stated in the opinion.

McElrath & Osment, for the Appellant, argued: The Court erred in allowing the witness Harris to answer, on cross-examination, whether he had been arrested for vagrancy; that it was an attempt to impeach the witness, and that a witness could only be impeached by contradictory evidence, or by evidence that his general reputation for truth and veracity was bad, and cited section two thousand and fifty-one of the Code of Civil Procedure. They also argued that the evidence was immaterial, and cited *People v. McDonald*, 39 Cal. 697. They also argued that the venue was not proved, and that the only proof on the point was that the deceased was killed on Clay street.

John L. Love, Attorney-General, and *Thos. P. Ryan*, for the People, argued that there was a distinction between being arrested for an offense and being convicted of an offense, because in case of conviction there must be a record, while in case of an arrest there might not be a record. They also argued that the objection that the evidence was immaterial was not a good one, as the only question was whether the evidence was competent. That evidence which went to the credibility of a witness need not be material to the issue; but the issue for the time being was dropped, and the question being tried was, whether the witness was to be believed; and that the only question arising here was, whether it was competent to impeach a witness by asking him if he had been arrested for vagrancy; and that therefore the objection that the evidence was immaterial was not good, and that, as no valid objection had been made to the testimony, no error was committed; and cited 18 Cal. 83; 23 Cal. 259, and 24 Id. 402. They also argued that explicit proof of the venue was not required, and cited 1 Wharton's Crim. Law, 601; *State v. Jones*, 1 McMullan, 246; and *People v. Williams*, 18 Cal. 187.

By the Court, CROCKETT, J.:

The defendant was convicted of murder in the second

Opinion of the Court — Crockett J.

degree, for the homicide of a Chinaman; and appeals from the judgment and from an order denying his motion for a new trial. We are asked to reverse the case on the ground that the evidence was insufficient to justify the verdict. But it is the peculiar province of the jury to weigh the evidence and decide upon the credibility of witnesses; and it is not our practice to disturb verdicts on this ground, unless there is either a total deficiency in the evidence, or it preponderates so greatly against the verdict as to render it clear that the jury must have been under the influence of passion or prejudice. In this case the evidence tending to fix the homicide upon the defendant was not very satisfactory; consisting first of the fact that he was present at the killing; second, that certain spots of blood were found upon his clothing; third, that a knife resembling one known to have been in his possession was discovered several days after the homicide in an alley-way, where he had the opportunity to have thrown it; fourth, that he made certain contradictory statements to the policeman as to his movements on the evening of the homicide. It cannot be said that this evidence did not tend strongly, if unexplained, to inculcate the defendant. It is also perfectly clear that the homicide was committed either by the defendant or one Brennan, both of whom were present at the time. But counsel insists that it clearly appears the killing was done by Brennan, and that the defendant, though present, took no part in it. It is true, the only eye-witnesses of the transaction, who professed to have seen the whole of it, are two women, whose testimony tends strongly to exonerate the defendant, and to fix the guilt upon Brennan. But it was for the jury to decide upon their credibility; and the result shows that their testimony was not credited. The jury appears to have placed more reliance on the testimony of the witness Cope, who saw a part of the transaction, and whose version of it tends to prove that the defendant struck the mortal blow. It will suffice to say on this point that we cannot disturb the verdict on the ground that it was not justified by the evidence.

Another point made by the appellant is that the venue

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was not proved. No witness testified in so many words that the killing occurred in the City and County of San Francisco. But the whole testimony, taken together, left no room for a reasonable doubt on this point. We think the venue was sufficiently proved.

On the cross-examination of a witness for the defense, the District Attorney, for the purpose of discrediting him, asked him this question: "Were you ever arrested on February 1, 1871? Were you not arrested February 1, 1871, for vagrancy?" which was objected to on the ground that it was immaterial, and that the record was the best evidence. The Court overruled the objection, and permitted the question to be put and answered; and the witness admitted that he had been so arrested for vagrancy. This ruling is relied upon as error.

The objection that the record is the best evidence is not tenable. An arrest for vagrancy does not necessarily imply that there was any record evidence of the arrest. In *People v. Snellie* (No. 2,959), decided at the April term, 1872, but not reported, a witness was asked if he had been arrested for larceny. It was objected that the record was the best evidence. But we held that the question "was not open to the objection that the evidence thereby sought to be elicited was not the best evidence in degree." The objection that the evidence was "immaterial" does not raise the point whether it was competent and admissible under section two thousand and fifty-one of the Code of Civil Procedure. There is a wide distinction between immaterial and incompetent evidence. It may be material and tend to prove the issue, but incompetent for that purpose under the rules of law. On the other hand, it may be competent evidence in a proper case, but immaterial to any issue before the Court. A party objecting to the admission of evidence, must specify the ground of his objection when the evidence is offered, and will be considered as having waived all objections not so specified. To have entitled the appellant to raise the point in this Court as to the competency of the evidence under the Code, he should have made the objection on that ground in the Court below.

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Judgment and order affirmed. Remittitur forthwith.

Neither Mr. Chief Justice WALLACE nor Mr. Justice McKINSTRY expressed an opinion.

[No. 3,269.]

SAMUEL CASSIDY AND DAVID JACKS v. JESSE D.
CARR AND LARKIN W. CARR.

APPROVAL OF A MEXICAN GRANT.—If the claimant of a Mexican grant of land which gives a perfect title, presents the same to the Board of Land Commissioners for confirmation, under the Act of Congress of 1851, and it is confirmed and surveyed, and the survey is approved and a patent issued, but by the survey a portion of the land included within the juridical measurement of the Mexican authorities is excluded, the claimant is estoppel from afterwards asserting title to the land not included in the survey made by the United States.

APPEAL from the District Court, Third Judicial District, County of Monterey.

August 5, 1834, Josepha Vallejo petitioned Governor Figueroa for a grant of a rancho called "Chualar," within the boundaries of the present county of Monterey. Accompanying the petition was a *diseño*, and a reference was made to the *ayuntamiento* of Monterey. A favorable report was made; the priests of the Mission of San Carlos consented to the grant. A reference was then made to the *Alcalde*, who reported favorably, and a definite grant was made of the land known by the name of "Chualar," bounded by the ranchos Rincon de Buenna Esperanza, Rio de Monterey, Rancho de Canulo and Sierra de Santa Fe. The grant was then approved by the Departmental Assembly. On the 6th day of September, 1839, the grantee abandoned the grant to Juan Malarin, who petitioned for a renewal of the grant to him. After the usual proceedings, there was a renewal of the grant to Malarin, and an approval by the Departmental Assembly, and juridical possession was given by metes and bounds. There was a map

Statement of Facts.

accompanying the expediente, and the rancho was described as containing two square leagues, a little more or less. Juan Malarin died prior to April, 1852, and Mariano Malarin was his executor, and on the 2d day of April, 1852, petitioned the Board of United States Land Commissioners, appointed under the Act of 1851, for a confirmation of the grant. The Commissioners confirmed the grant. An appeal was taken by the United States to the District Court for the Southern District of California, and the judgment of the Land Commissioners was affirmed on the 11th day of January, 1856. On the 5th day of February, 1856, the United States waived the right of appeal. A survey was then made, which was, on the 25th day of March, 1862, returned into the United States District Court, and on the next day exceptions were taken to the survey, and on the 12th day of June, 1865, the survey was confirmed by said Court.

No appeal was taken from the decree confirming the survey. This was an action of ejectment to recover possession of the whole Rancho known as "Chualar." The plaintiffs claimed under Malarin.

The defendants were in possession of three hundred and twenty acres of land in location number four hundred and seventy-seven, of unsurveyed lands, San Francisco Land District, fractional north half of section eight; fractional northwest quarter and fractional northeast quarter of section nine; and southwest half of southwest quarter of section four, in township number sixteen, range number five east, Mount Diablo Meridian. Also, two hundred and eighty acres of land in location number four hundred and seventy-eight, of unsurveyed lands, San Francisco Land District, southeast quarter of southwest quarter, fractional southeast quarter and fractional east half of northeast quarter of section four. Also fractional northwest quarter of section three, in township number sixteen, range number five east, Mount Diablo Meridian. The land of which the defendants were in possession was within the exterior boundaries of the grant made to Malarin by the Mexican nation, but outside of the exterior boundaries of the grant as confirmed and surveyed by the United States.

Argument for Appellant.

The defendants claimed title to the land of which they were in possession, under certificates of purchase issued to them by the State of California, under an Act of the Legislature, approved April 23, 1858, entitled, "An Act to provide for the location and sale of the unsold portion of the five hundred thousand acres of land donated to this State for school purposes, and the seventy-two sections donated to this State for the use of a seminary of learning."

The Court below rendered judgment in favor of the plaintiffs, and, on application of the defendants, granted a new trial. The plaintiffs appealed from the order granting a new trial.

W. H. Patterson, for the Appellant.

The only question presented to the Court is, can the United States cut down a Mexican grant of a specific tract by metes and bounds, approved by the Departmental Assembly, of which juridical possession is given? Such power is claimed to rest upon the Act of Congress, providing for the survey of private land claims, and the legislation subsequent thereto.

By the confirmation, the claim was saved from forfeiture. And to maintain that a part of the tract can be cut off is practically to maintain that notwithstanding the treaty with Mexico, the United States had absolute power to confiscate all or some portion of the property which that compact guaranteed should be protected. *Minturn v. Brower*, 24 Cal. 644, is opposed to any such doctrine.

The grant in question was not inchoate, but was a perfect and complete title. (23 How. 498, Yontz case; *Steinbach v. Moore*, 30 Cal. 508.)

The eighth article of the Treaty operated immediately upon this grant, "retaining the property which they possess in the said territory," etc., and Justice CURRY said of it: "That it was intended by the treaty that Mexicans then established in California, and having property therein, should retain and enjoy it, or dispose of it, as to them might seem proper, the language of the treaty places beyond controversy." (See also *U. S. v. Wiggins*, 14 Pet. 349; quoted 24 Cal. 662; 5 Wallace, 834.)

Argument for Respondent.

Wm. Matthews, for Respondent.

Assuming, firstly, the grant to Malarin, upon which the plaintiff counts, to be perfect, the question of the power of Congress to compel him to submit his title to the Commission does not arise in the present case, for the claimant presented his grant for adjudication; and having elected to do so, is bound by the result of the litigation which he has initiated.

In *Minturn v. Brower*, (24 Cal. p. 664), the Court say:

“That the citizen of the Mexican Republic who was seized in fee simple absolute of lands in California at the date of treaty, and who thereafter elected, according to its provisions, to become a citizen of the United States, could, if he choose to do so, have submitted his title and claim to such lands to be passed upon by the Commissioners and the proper Courts, under the Act of 1851, we have no doubt. * * *”

The constitutionality of the Act of March 3d, 1851, is therefore not involved in the present case.

Mr. Matthews relied upon the opinion of the Hon. LORENZO SAWYER, Judge of the Circuit Court of the United States for the Ninth Judicial Circuit, District of California, in the case of *Boyle v. Hinds*.

The following is the opinion:

The Mexican Government, in 1839, granted a rancho called “*Estero Americano*,” to Edward Manuel McIntosh. The grant was for two square leagues, within certain designated boundaries embracing six or more square leagues. It contained the usual provisions for measuring the land, and leaving the surplus to the nation. The grant was approved by the Department Assembly. Afterwards, juridical possession was given by J. P. Leese, as first Alcalde of the jurisdiction within which the land granted was situated. The juridical possession, so far as I am informed as to the requirements of that ceremony prescribed by the laws then in force on the subject, is in all respects regular and in due form. The juridical possession, instead of be-

Argument for Respondent.

ing limited to two, embraces at least six square leagues. Prior to 1850, McIntosh conveyed his grant to Jasper O'Farrell, who, in 1852, presented the grant for confirmation; and it was subsequently confirmed to the extent of two leagues only, surveyed and patented—the patent covering about two leagues. O'Farrell took his patent without objection, and placed it on record in the Recorder's Office of Sonoma County. The land in question lies within the juridical possession given to McIntosh, but without the limits of the final survey and the patent issued to O'Farrell. Whatever title O'Farrell had under the grant has, since the commencement of the proceedings for confirmation, passed to the plaintiff by proper conveyances. After the issue of the said patent to O'Farrell, in pursuance of the decree of confirmation, the United States issued in due form to the defendant Hinds, as a preëptioner, a patent to the land in controversy; and he was in possession at the commencement of this action, claiming title under said patent.

The plaintiff claims that McIntosh had a perfect Mexican title, and that it was unnecessary for his grantee, O'Farrell, to present his claim for confirmation; that, his title being perfect, Congress had no constitutional power to deprive him of his land in case of his failure to present his claim under the Act of 1851. *Minturn v. Brower*, 24 Cal. 644, is relied on as authority for this position. Under the view I take, it may be conceded that it was unnecessary to present the claim; but the claimant did present his grant, and submit it to examination, and asked its confirmation under the Act of Congress. The questions as to the genuineness and extent of the grant were litigated between the government and the claimant before a tribunal having jurisdiction to determine them. The grant was confirmed to the extent of two square leagues, and no more. The juridical possession was put in evidence, and the extent of the land to which the claimant was entitled in fact, determined. The claimant did not appeal, and the determination became final. He had a right of appeal under the Act, and could have gone from Court to Court, and ultimately had the question directly adjudicated by the Supreme Court of the United

Argument for Respondent.

States in that proceeding, whether he had a title to the full extent of the juridical possession or not. The same Courts would then have passed upon his title in a direct proceeding to establish his claim to the whole, that are now called upon to determine the same question collaterally. The law afford him tribunals to determine this very question between him and the United States. The very object of the law was to definitely ascertain what land belonged to Mexican grantees and what to the United States, in order that the United States might dispose of that which it owned to other parties. The owner of the grant availed himself of the right afforded by the Act of Congress, and the question between him and the United States was litigated and determined. If he had appealed to the Supreme Court in that proceeding—a direct proceeding to determine the validity and extent of the grant, the amount of land to which he was entitled under his perfect grant, if it be such—and the Supreme Court had determined that he must be limited to two leagues, I apprehend that the same question could not be litigated over again collaterally in the same or other Courts. The same questions now raised could just as well have been presented then as now. The Land Commission and the Courts on Appeal had jurisdiction to determine them. They were embraced within the issues, and actually litigated and determined. The fact that the claimant did not appeal cannot affect the question. If he chose to accept the decision of the inferior tribunal, he is bound by it. (*Gray v. Dougherty*, 25 Cal. 266; *Garwood v. Garwood*, 29 Cal. 515.) Besides, the fifteenth section of the Act of 1851, makes the adjudication final between the government and the claimant, and it must be regarded as *res adjudicata*. The proceedings ending in a decree limiting the confirmee to two leagues are clearly judicial. The survey and patent but carry out the decree of confirmation. The patent is the final authentic record of the proceeding, and is conclusive evidence between the parties of the extent of the grant and the correctness of the location.

This appears to me to be the result upon authority, as well as upon principle, where the claimant under a Spanish

Opinion of the Court — McKINSTRY, J.

grant, whatever the character of the grant may be, has presented his claim, litigated it with the government in the tribunals provided for the purpose, and had the genuineness and extent of the grant determined. The following authorities lead to this conclusion: *Leese v. Clark*, 20 Cal. 423; 18 Id. 571; *Teschmacher v. Thompson*, 18 Cal. 26; *Board v. Federy*, 3 Wall, 491-2; *Rodrigues v. U. S.*, 1 Wall. 591; *Treadway v. Semple*, 28 Cal. 655.

Judgment must be rendered for defendant with costs, and it is so ordered.

Delivered February 2, 1874.

By the Court, McKINSTRY, J.:

The plaintiff seeks to recover as assignee of a claim derived from the Mexican government. The claim was confirmed by the Land Commissioners and by the District Court; and the appeal to the Supreme Court of the United States was afterward dismissed. The survey of the Surveyor-General was returned to the District Court, and the claimant, having filed his exceptions to it, and the same having been argued, the survey as returned was approved by that Court and made final. By the approved survey the lands — the possession of which is sought to be recovered in this action, and which were included within the juridical measurement of the Mexican authorities — were excluded.

It may be assumed, as is asserted by plaintiff, that the *expediente* shows a "perfect title." Yet the claimant, who submitted his claim for confirmation or rejection, and to proceedings the object of which was to segregate lands granted by Mexico from the public domain of the United States, could not, nor can his grantee now be heard to assert title to any lands not included in the final survey.

Order affirmed.

Statement of Facts.

[No. 2,054.]

**E. ROPER v. P. C. McFADDEN, THOMAS CLARK,
JAMES BROOKS AND WILLIAM HAYES.**

POWER OF ATTORNEY.—A power authorizing the attorney in fact to sell all the real estate of the principal, lying in the City and County of San Francisco, is good, without a particular description of the property owned by the principal.

IDEM.—The fact that a power of attorney is not acknowledged or recorded, does not affect its validity.

OBJECTION TO TESTIMONY.—It is not error to admit irrelevant testimony, if an objection that it is irrelevant is not made.

EVIDENCE IN EJECTMENT.—In ejectment, a deed to the defendant, executed subsequent to the commencement of the action, is admissible in evidence on his behalf, if a supplemental answer is filed, setting up the title acquired through the deed.

FILING SUPPLEMENTAL ANSWER.—If a supplemental answer contains a recital that it was filed by leave of the Court, and it is a part of the judgment roll brought up by the plaintiff on his appeal, the appellate Court will presume that there was an order of Court allowing it to be filed.

OBJECTION TO EVIDENCE.—If, on a trial before the Court without a jury, evidence is admitted, subject to an objection made, and afterwards, on the final hearing, the Court rejects it, this is sustaining the objection, and the party objecting cannot complain.

CONFLICT IN EVIDENCE.—The Judge of the Court below, who hears the oral testimony, and observes the conduct and bearing of the witnesses, is best able to pass on it when there is a conflict, or when there are discrepancies and inconsistencies, and the appellate Court will not disturb his finding.

ADMISSION OF DEED IN EVIDENCE.—If, in ejectment, there is evidence of the former possession of the party under whom the defendant claims, the deed of such party is admissible on behalf of the defendant.

APPEAL from the District Court, Twelfth Judicial District, City and County of San Francisco.

Ejectment to recover a part of block sixty-three, in the City and County of San Francisco. The defendant in the course of the trial, offered in evidence the following power of attorney:

“Know all men by these presents, that I, Loren Davis, of the city of San Francisco, State of California, have made, constituted, appointed, and by these presents do make, constitute and appoint Nathaniel C. Lane, of the same

Statement of Facts.

place, my true and lawful attorney for me and in my name, and for my account, to lease or sell any and all my real estate in San Francisco city, State of California, and for me and in my name, to execute and deliver lease, and quitclaim deed, for the same. Also to demand and receive, and give valid and sufficient acquittance for all moneys which shall become due and owing to me by means of such leases, sales or transactions connected with said real estate, giving and granting to my said attorney, full power and authority to do and perform every act above specified, as fully to all intents and purposes as I might or could do if personally present, hereby ratifying the same.

In witness whereof, I have hereunto set my hand and seal this thirtieth day of July, in the year one thousand eight hundred and fifty-five.

LOREN DAVIS, [SEAL.] ”

The plaintiff objected to the power because it did not describe any property, and was not acknowledged or recorded.

The Court overruled the objection.

The premises in controversy were within that portion of the City and County of San Francisco, where the title was vested in the first possessor. The defendants, McFadden and Clark, were the tenants of defendant Hayes. The defendant, Brooks, claimed to own, in severalty, a portion of the demanded premises. The defendants introduced testimony, tending to show that one Beideman was in possession of the demanded premises before 1854, and introduced in evidence a deed from Beideman to Holladay, dated May 25, 1854, and deeds from Holladay to Gilbert, from Gilbert to Barrett, from Barrett to Van Bokkelen, and from Van Bokkelen to Hayes, dated January 16, 1862. The defendants recovered judgment, and the plaintiff appealed.

The other facts are stated in the opinion.

E. A. Lawrence, for the Appellant.

Wm. Hayes, for the Respondents.

Opinion of the Court — NILES, J.

By the Court, NILES, J.:

1. The power of attorney from Davis to Lane was properly admitted. It purported to empower Lane to lease or sell and convey all of the real estate of Davis in the city of San Francisco. No description of the land was necessary. Nor does the fact that the power of attorney was not acknowledged or recorded affect its validity. We are unable to see in what respect the power was material evidence in the case, but no objection was taken upon the ground of irrelevancy.

2. There was sufficient evidence of the possession of Beideman to warrant the introduction of his deed to Holladay. The deed from Van Bokkelen to Hayes was a link in the same chain of title, and equally admissible.

3. The objection to the admission of the power of attorney from Davis to Taylor, and the deed from Davis to Hayes is placed upon the ground that they were made subsequently to the commencement of the action. It is an answer to this objection that supplemental answers were filed, setting up the title acquired through these deeds. These answers contain recitals that they were made by leave of the Court, and they appear as a part of the judgment-roll, in the transcript brought up by the appellant himself. We shall presume there was an order of Court allowing them to be filed.

4. The objection to the tax-deed from Washburn to Hayes was substantially sustained. It was received "subject to objection" (by which we understand that the Court reserved the objection for future consideration), and on the final hearing the objection was sustained and the deed rejected as evidence.

5. This is not a case in which the decision and judgment of the Court below ought to be disturbed, upon the ground that the testimony was insufficient to support the decision. Apart from the evidence of the defendants in support of their title, the testimony on the part of the plaintiff was unsatisfactory. It presented discrepancies and inconsistencies which the Court below might very well find it

Points decided.

difficult to reconcile, and upon which only the Judge who heard the oral testimony, and observed the conduct and bearing of the witnesses is competent to pass. Upon well settled principles his decision in this regard is final.

Judgment and order affirmed. Remittitur forthwith.

Mr. Justice McKINSTRY did not express an opinion.

[No. 4,049.]

JAMES B. HESS v. JOHN BOLINGER.

WHEN DECISIONS OF LAND OFFICERS MAY BE CORRECTED BY COURTS.—In the absence of fraud or imposition, the decision by the Registers and Receivers of the United States Land Office, of controverted questions of fact which they have jurisdiction to pass on, will not be reviewed by the Courts; but an error committed by those officers in a matter of law may be corrected, and the proper relief granted by the Courts.

WHEN PREEMPTOR WHO RECEIVES A PATENT HOLDS THE TITLE IN TRUST.—If the Land Officers of the United States allow a person to enter as a preëmtor, land not included in his declaratory statement, and he receives a patent therefor, he will be held to have the legal title in trust for another person, who was entitled to preëmt the same, and who proved up and tendered payment which was refused.

DECLARATORY STATEMENT OF A PREEMPTIONER.—The question whether the declaratory statement filed by a preëmtor, includes a piece of land in controversy, is to be decided on the face of the statement, in the light of the surrounding circumstances.

RIGHTS OF PREEMPTORS.—The facts, that a preëmtor settles upon and improves the south half of a quarter section, and files his declaratory statement for that, and the south half of an adjoining quarter section, do not preclude another person from afterwards settling upon and preëmpting the north half of the first named quarter section.

OBJECTION TO AGREED STATEMENT OF FACTS.—If the parties agree upon the facts, subject to all legal objections, and the agreed statement of facts is admitted in evidence without objection, neither party can raise the point in the Supreme Court, that some of the admitted facts were not admissible in evidence under the pleadings.

JUDGMENT ON AGREED STATEMENT OF FACTS.—If the defendant in ejectment sets up in his answer, that the plaintiff obtained a patent for the land as a preëmtioner, and that the defendant was entitled to preëmt it, and that the plaintiff holds the legal title in trust, but does not aver the facts showing his right to preëmt, and the parties agree on a statement of facts which entitle the defendant to a judgment, the judgment in his favor will not be reversed, because the answer was defective in not stating such facts.

Argument for Appellant.

APPEAL from the District Court, Third Judicial District, County of Santa Clara.

The answer of the defendant was claimed to be defective, in not stating fully the existence of all the facts which entitled the defendant to preëempt under the laws of the United States. The Court below adjudged that the plaintiff should convey the land to the defendant upon being paid what it cost him, and interest thereon. The plaintiff appealed.

The other facts are stated in the opinion.

C. B. Younger, for the Appellant.

Upon the agreed facts, the plaintiff was entitled to judgment for possession of the land in suit.

The determination of the officers of the United States as to the preëmption rights of the parties and their qualifications, was final and conclusive, unless some question of fraud or trust intervenes. (Secs. 11 and 12 of the Act of 1841, 1 Lester, p. 62; *Burrell v. Haw*, 40 Cal. 373; *Marquez v. Frisbie*, 41 Id. 624.)

The answer does not aver fraud on the part of plaintiff, nor does the case show that there was any relation of trust between the parties. Both plaintiff and defendant had a full and complete hearing before the officers appointed by the government to hear and determine the respective rights of the parties to the land in controversy; and, unless the adjudication of the officers of the law can be impeached for fraud, or on the ground that they had no authority to hear and determine the matter, their decision is final and conclusive; and so the cases relied on by defendant hold. In the case of *Lytle v. Arkansas* (9 How. 333), the complainant had proved his preëmption to the entire satisfaction of the land officers, and through misconduct and neglect the officers failed to secure to complainant his rights thus proved. The case at bar differs from the one cited in that essential. Here the parties presented their respective claims to the land in controversy, and the officers decided that the plaintiff had the superior right to a patent for the land in contest. If the

Argument for Respondent.

Register and Receiver — who are constituted by law a tribunal to determine the rights of those who claim preëmption—act within their powers, as sanctioned by the Commissioner, and within the law, and their decision cannot be impeached on the grounds of fraud or unfairness, it must be considered final.

Moore, Laine and Leib, for the Respondent.

The officers of the Land Office act ministerially only and not judicially; and their decisions are not conclusive where fraud or trust intervenes; in such cases the Courts will control the patent, and compel the one who holds it to convey it to the one to whom it rightfully belongs.

A trust arises whenever a party shows he is entitled to the patent which by some means, no matter what, has been given to another. It makes no difference how the error occurred by the land officers, or whether they erred as to a matter of fact, or upon a question of law. In this case the errors were purely of law, as shown by the transcript, viz.: 1st, that the plaintiff was entitled to the land because he had settled upon the land adjoining that in dispute before defendant had made his settlement. That was one error. 2d, that plaintiff had a proper declaratory statement as to the land in dispute. That was the other.

Some of the first few cases on this subject happened to be cases in which the mistake was one of fact, and which was occasioned by the fraud of the other party; hence it was strenuously urged by counsel in succeeding cases that it was only in cases of mistake of fact occasioned by the fraud of the other party, where relief would be given by the Courts; but such doctrine never obtained, and the latter cases have laid down the rule most decisively the other way. Among the numerous cases sustaining the above proposition may be cited the following: *Bird v. Ward*, 1 Mo. 398; *Lytle v. Arkansas*, 9 How. 333; *Cunningham v. Ashley*, 14 How. 388; *Garland v. Wynn*, 20 How. 6; *O'Brien v. Perry*, 1 Black, 132; *Lindsey v. Hawes*, 2 Black, 558; *State of Maine v. Bachelder*, 1 Wall. 115; *U. S. v. Stone*, 2

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Wall. 535; *Hughes v. United States*, 4 Wall. 236; *Stark v. Starrs*, 6 Wall. 419; *Silver v. Ladd*, 7 Wall. 224-8; *Johnson v. Towsley*, 13 Wall. 72; *Samson v. Smiley*, 13 Wall. 91; *The Yosemite Case*, 15 Wall. 77; *McDowell v. Morgan*, 28 Ill. 528; *Shelton v. Keirn*, 45 Miss. 106.

No preëmption patent can rightfully issue to a person for a piece of land for which he never filed a declaratory preëmption statement.

The cases are full on this point. (*Megerle v. Ashe*, 33 Cal. 83; *Damrell v. Meyer*, 40 Cal. 70; *Poppe v. Aihearn*, 42 Cal. 606; *Daniels v. Lansdale*, 43 Cal. 41; 1 Lester, 63, Sec. 15; 1 Lester, 207, Sec. 6; 1 Lester, 362 and 366-7; 1 Lester, 700; 1 Lester, 48, Sec. 7.)

By the Court, CROCKETT, J.:

The action is ejectment for the north half of the northeast quarter of section twenty-six, and the plaintiff claims under a patent from the United States for the whole quarter-section, founded on a preëmption claim of the plaintiff. The answer alleges that the defendant was a qualified preëmptioner, and settled upon and improved the north half of the quarter, and within the proper time filed his declaratory statement in due form, proved upon his claim, and offered to pay the purchase-price; but that the Register and Receiver wrongfully awarded the land to the plaintiff, whose declaratory statement, though prior in time, was filed at a period when the land was not subject to preëmption, and, moreover, did not include the premises in controversy. The answer asks for affirmative relief, and prays that the plaintiff be adjudged to be a trustee, holding the legal title for the use of the defendant.

The case was tried upon an agreed statement of facts, from which it appears that the land which the plaintiff applied for, was described in his declaratory statement as follows: "The northeast quarter of section number twenty-six; also about thirty-five acres within my enclosure, lying along the east side of the northwest quarter of section twenty-six, hereby intending to apply in the aggregate

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only to the extent of one hundred and sixty acres, being the amount that is embraced within my enclosure in section twenty-six, township number seven south, range number one west, Mount Diablo meridian, in the district of land subject to sale at the Land Office in San Francisco, and containing one hundred and sixty acres." It further appears from the agreed statement that after the defendant had filed his declaratory statement, the plaintiff filed in the Land Office "an abandonment of eighty acres outside of the said quarter section, and included in (his) said declaratory statement, it, the said eighty acres, being the east half of the northwest quarter of section twenty-six, township seven south, range one west, Mount Diablo meridian." It was also admitted that when the plaintiff filed his declaratory statement, he had in his actual possession, and for upwards of ten years had been in possession of more than twenty acres of the south half of the northwest quarter, and that he had never been in possession of any portion of the north half of the northeast quarter, which for more than fifteen years had been in the actual possession of the defendant's predecessors. Construing the plaintiff's declaratory statement in the light of these facts, it is clear that it does not include and was not intended to include the north half of the northeast quarter, the premises in controversy; and the defendant, being a qualified preëmtioner, and having settled upon and improved the land, and having duly filed his declaratory statement, proved up his claim, and offered payment, should have been allowed to preëempt the land. It is contended, however, that the action of the Land Department in awarding the land to the plaintiff, cannot be reviewed in the Courts. But in *Hosmer v. Wallace*, (47 Cal. 461,) we held that whilst in the absence of fraud or imposition, the decision by the Land Department of controverted questions of fact, which they have jurisdiction to decide, will not be reviewed by the Courts; nevertheless, an error in a matter of law by the officers of the Land Department may be corrected and the proper relief granted by the judicial department of the government. It appears from the agreed statement that the Register and Receiver

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awarded the land to the plaintiff upon the ground, "and none other, that plaintiff was the first settler, upon said northeast quarter of section twenty-six, and on that ground had the better right, and decided that plaintiff's said declaratory statement was properly filed for and included the said northeast quarter of section twenty-six." It was a question of law whether the plaintiff's declaratory statement included the north half of the quarter, to be decided on the face of the statement, interpreted in the light of the surrounding facts. As we have already seen, the declaratory statement did not include these premises, and the Register and Receiver committed an error of law in holding that it did. It is equally clear that, because the plaintiff settled upon and improved the south half of the quarter and filed his declaratory statement for that and the south half of the northwest quarter, this did not preclude the defendant from afterwards settling upon, improving, and pre-empting the north half of the quarter, which was not then claimed by the plaintiff under his declaratory statement. It, therefore, affirmatively appears that the land was awarded to the plaintiff, not through any mistake of the facts, but by an error in law on the part of the officers of the Land Department.

We have not considered the objections taken by demurrer to the answer. The facts being agreed, and having been put in evidence without objection, the plaintiff cannot now raise the point that they were inadmissible under the pleadings. The stipulation, it is true, states that the facts are admitted, "subject to all legal objections." But if counsel considered any of the admitted facts incompetent or inadmissible under the pleadings, he should have stated his objection at the time, and have reserved an exception, if the objection was overruled. Not having done so, it is too late to raise the point now; and the defendant being entitled to judgment on the agreed statement of facts, we ought not to reverse the judgment, even though the answer be defective in the particulars alleged. Section four hundred and seventy-five of the Code of Civil Procedure provides that in every stage of an action the Court must dis-

Argument for Respondent.

regard any error or defect in the pleading or proceedings which does not effect the substantial rights of the parties, "and no judgment shall be reversed or affected by reason of such error or defect." The defects, if there be any, in the answer, cannot affect the substantial rights of the parties, on the facts admitted, without objection at the trial.

Judgment affirmed. Remittitur forthwith.

[No. 3,841.]

WILLIAM HOWELL v. A. J. SCOGGINS.

DAMAGES FOR ASSAULT AND BATTERY.—In an action for an assault and battery, the jury, in estimating the damages, cannot take into consideration the plaintiff's expenses in the prosecution of the suit.

APPEAL from the District Court, Tenth Judicial District, County of Colusa.

The evidence on the trial was confined to the circumstances constituting the assault and battery. No evidence was offered tending to show that the plaintiff had paid or become liable to pay any money for medical attendance, nursing, board, or for the prosecution of the action. The plaintiff recovered judgment for eight hundred dollars and costs, and the defendant appealed.

The other facts are stated in the opinion.

W. C. Belcher and *W. F. Goad*, for the Appellant, cited *Day v. Wentworth*, 13 How. 371; *Barnard v. Poor*, 21 Pick. 381; *Lincoln v. Schenectady and Saratoga R. R. Co.*, 23 Wend. 435, and *Hicks v. Foster*, 13 Barb. 663.

James Hart, *J. O. Goodwin* and *S. D. Wall*, for the Respondent, argued that, as there was no evidence before the jury as to expenses, the presumption was that the verdict did not include any expenses; and that, therefore, the defendant was not injured by the instruction. They also argued that the instruction was correct; and cited, *Platt v.*

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Brown, 30 Conn. 336; *St Peter's Church v. Beach*, 26 Conn. 355; *Dibble v. Morris*, 26 Conn. 416; *Ives v. Carter*, 24 Conn. 392; *Beecher v. Derby Bridge Co.* Id. 491; *Marshal v. Betner*, 17 Ala. 883, and *Whipple v. Cumberland Manufacturing Co.* 2 Story, 661.

By the Court, MCKINSTRY, J.:

This was an action for an assault and battery. The Court instructed the jury: "In actions of aggravated assault and battery, the jury are not limited in assessing damages to mere compensation, but may give exemplary damages, and may take into consideration the plaintiff's expenses in the prosecution of the suit." In a note at the foot of this charge, Hilliard on Remedies for Torts, and Sedgwick on damages are cited as authority for it.

Hilliard, at the page referred to (442), only says that it "has sometimes been held" that the jury may take the plaintiff's expenses into consideration.

The instruction given would authorize a jury to take into consideration all the plaintiff's expenses.

But in Connecticut — one of the States in which it has been held that the probable expenses of the plaintiff may be considered by the jury as part of the exemplary damages — it has also been decided that the jury cannot take into consideration the taxable costs paid by plaintiff, and which he would recover of defendant as an incident to the judgment, otherwise the defendant would pay these costs twice. (*Beecher v. Derby Bridge Co.* 24 Conn. 132 and 491.)

The bald question presented by the charge is whether the jury can guess at the probable amount paid, or agreed to be paid, by the plaintiff to his counsel, or at the amount of his other expenses, and include such amount in their estimate of exemplary damages.

In a note to the sixth edition of Sedgwick's Measure of Damages (p. 111), it is said: "It is difficult to see why such expenses should be allowed under the head of 'exemplary damages.' There is nothing especially punitive, as regards the defendant, in the fact that the sum in which he

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is mulcted happens in whole or in part to represent the counsel fees paid or incurred by his injured adversary."

Except that taxed costs are never allowed, the law, as laid down in the charge, accords with the views expressed by the Supreme Court of Connecticut and of Alabama.

But after full consideration it was held by the Supreme Court of the United States (*Day v. Woodworth*, 13 How. 371), that the jury have no right, in actions of trespass, whatever the circumstances of aggravation, to include in their verdict any sum to indemnify the plaintiff for counsel fees, or other real or supposed expenses, over and above taxed costs.

Mr. Justice GRIER said: "It is true, no doubt, and is especially so in this country (where the legislatures of the different States have so much reduced attorney's fee bills, and refused to allow the *honorarium* paid to counsel to be exacted from the losing party), that the legal taxed costs are far below the real expenses incurred by the litigant; yet it is all the law allows as *expensa litis*. If the jury may 'if they see fit' allow counsel fees and expenses as part of the actual damages incurred by the plaintiffs, and then the Court order legal costs *de incremento*, the defendant may truly be said to be *in misericordia*, being at the mercy both of Court and jury. Neither the common law nor statute law of any State, so far as we are informed, has invested the jury with this power or privilege. It has sometimes been exercised by the permission of Courts, but its results have not been such as to recommend it for general adoption, either by Courts or Legislatures." (372) Again: "The expenses of the defendant over and above taxed costs are usually as great as those of plaintiff; yet neither Court nor jury can compensate him, if the verdict and judgment be in his favor, or amerce the plaintiff *pro falso clamore* beyond taxed costs."

In *Fairbanks v. Winter*, (18 Wis. 287) the Circuit Court permitted a witness for plaintiff — a lawyer — to be asked, "what in your judgment is a fair compensation to a lawyer for bringing and prosecuting this action?" The Supreme Court held an objection to the question to have been well

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taken; and Chief Justice SHAW, in *Barnard v. Poor*, (21 Pick. 882,) said: "It is now well settled that even in an action of trespass, or other action sounding in damages, the counsel fee and other expenses of prosecuting the suit, not included in the taxed costs, cannot be taken into consideration in assessing damages; and, if such costs were included by a jury, it would be irregular and erroneous."

In *Lincoln v. S. & S. R. R. Co.*, (23 Wend. 434,) NELSON, C. J., remarked: "The charge as to expenses beyond taxable costs and counsel fees in conducting the suit, as a particular item of damage to be taken into the account, I am also inclined to think was erroneous. These have been fixed by law, which is as applicable to cases sounding in damages as in debt." In *Hicks v. Foster*, (13 Barb. 663,) it was held that, in an action of slander, it was erroneous for the judge to charge the jury that "they have a right to take into consideration the expenses to which the plaintiff has been put, by being compelled to come into Court to vindicate her character."

The damages found by the jury were not excessive, and if we could be at liberty to disregard the error of the Court below, or were satisfied that it did not influence the action of the jury, we should affirm the judgment.

But it must be assumed that the jury did what they were instructed to do; that they took into consideration the plaintiff's expenses in the prosecution of the suit.

Judgment and order denying new trial reversed, and cause remanded for new trial.

[No. 4,153.]**REVILLO A. SWAIN v. CHARLES P. DUANE ET AL.**

DEED TO MARRIED WOMAN FOR CONSIDERATION.—A deed to a wife, made by a person other than the husband, for a valid consideration paid to the grantor by the husband, which conveys the property to the grantee "as her separate property, and to and for her sole and separate use," constitutes the premises, in law, the separate estate of the wife, and the husband cannot maintain ejectment for their recovery.

Opinion of the Court — Wallace, C. J.

IMPROVEMENTS BY HUSBAND ON WIFE'S PROPERTY.—If the wife has the legal title as of her separate estate, the building of fences and other acts of possession done by her husband will be considered to have been done by him as her agent, for her benefit, and in subordination to her title.

OUTSIDE LANDS IN SAN FRANCISCO.—A conveyance made by the city of San Francisco to one in possession of outside lands merely has the effect to aid and assure the title already held.

LEGAL EFFECT OF DEED IN EJECTMENT.—If the husband brings ejectment, and relies on a deed to his wife making the demanded premises her separate property, as a muniment of title, and no equitable defense is set up, neither party can make enquiry for the purpose of controlling or defeating the legal effect of the deed.

APPEAL from the District Court, Nineteenth Judicial District, City and County of San Francisco.

The defendant appealed.

The other facts are stated in the opinion.

G. W. Tyler, for the Appellant.

E. A. Lawrence, for the Respondent.

By the Court, WALLACE, C. J.:

The action is ejectment, and the plaintiff having rested, the defendant moved for a nonsuit, which motion was denied, and the defendant not offering any evidence, judgment was rendered for the plaintiff.

To establish his right to recover, the plaintiff gave evidence tending to prove that, in 1855 or 1856, one Treat was in possession of the premises in controversy, and while so in possession conveyed them to one Reis; that in 1867, Reis, in consideration of two thousand four hundred dollars paid by plaintiff, conveyed the premises to Alice H. Swain, the wife of the plaintiff, "as her separate property, and to and for her sole and separate use, benefit and behoof," etc.; that in 1868-9, the plaintiff caused the premises to be inclosed with a fence, etc.; and that in 1871 the City and County of San Francisco made to the wife of the plaintiff a quitclaim deed of the premises.

1. The conveyance from Reis to Alice H. Swain, made in June, 1867, though made for a valuable consideration paid

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to the grantor, running to her, as it did "as her separate property and for her separate use, benefit, and behoof," etc., constituted the premises her separate estate. This is apparent upon the face of the instrument by which Reis parted with his estate. It was the intent of the grantor that the grantee should be seized of the premises conveyed, not as of property belonging to the marital community of which she was a member, but as of her separate estate; and in an action of this character no inquiry is to be permitted to either party for the purpose of defeating or controlling the legal effect of the deed, as vesting the premises in the grantee as of her separate estate.

It is not doubted that a creditor of the husband seeking to subject the property to the payment of his debt, or indeed, any person having an interest in the question, upon proper allegation, and impleading the wife as a party, might institute an inquiry into the true nature of the transaction in which the conveyance to her originated; but the case at bar is not one of that character, and the legal import of the conveyance, appearing on its face, cannot be displaced or overcome by proof *ab extra*.

2. The wife being seized of the premises, as of her separate estate, the building of the fence, and other acts of possession done by her husband in 1868-9, must be considered to have been done by him as her agent, for her benefit, and in subordination to her title, and not as independent acts of possession for his own benefit, or in hostility to her title.

3. The effect of the quitclaim deed of the city to Alice, made in 1871, purporting to convey to her the same premises, was merely to aid and assure the title and possession which she then already held under the conveyance from Reis.

It results that the plaintiff did not establish in himself a right to recover the possession of the premises, and the nonsuit should have been granted.

Judgment reversed and cause remanded for a new trial.

RHODES, J., concurring specially:

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I concur with the Chief Justice in his opinion in respect to the operation and effect of the deed of Reis to Alice H. Swain; and also in respect to the admissibility and effect of evidence to alter or control the legal operation and effect of the deed, in any action except one in which the pleadings present the issue, and in which the proper parties are before the Court.

I am of the opinion that the deed from the city to Alice H. Swain is to be regarded as a donation, and that it conveyed to her, as her separate property, whatever title the city then held.

McKINSTRY, J., concurring specially:

I concur in the judgment.

[No. 2,632.]

THOMAS DENNIS v. JOSEPH M. WOOD AND J. H. JOHNSON.

EVIDENCE OF TITLE IN FORCIBLE ENTRY AND DETAINER.—In an action of forcible entry and detainer, a defendant may introduce evidence of title in himself not for the purpose of establishing or trying title, but for the purpose of showing that his entry, if wrongful, was not made with a wrongful intent, but in good faith; and if he does so, the plaintiff cannot, in rebuttal, introduce evidence showing title in him.

UNLAWFUL ENTRY AND DETAINER.—If a defendant, in an action of forcible entry, enters upon the demanded premises in good faith, under claim and color of title, his entry is not unlawful, within the meaning of the Forcible Entry and Detainer Act.

APPEAL from the County Court, City and County of San Francisco.

Action of forcible entry and unlawful detainer, to recover a lot on the northwest corner of Broadway and Gough streets, in the City and County of San Francisco. The complaint averred that the plaintiff was in the peaceable possession of the lot on the 14th day of November, 1868, and that on said day, the defendants, with a strong hand and violence, entered.

Argument for Appellant.

At the commencement of the trial, the defendants' counsel stated that the only defense was an entry in good faith, and under color of title.

The plaintiff then proved that he went into the possession of the premises on the 4th day of November, 1867, under a lease from R. E. Raimond, and that he remained there until about two weeks before the 14th day of November, 1868, when he left temporarily, and locked up the house, and kept the key. That he returned on the 14th day of November, and found the door broken open, and two men in the house. That the two men said they were in the employ of J. M. Wood, and refused to let him enter. That he returned in the evening and went into the house, and shortly after, defendant Wood came in and told him to leave, and shoved him out of the house.

The defendants offered in evidence, several deeds showing a chain of title from Herman Winchester to defendant Wood, from 1851 to October, 1868. The defendants also offered evidence tending to show the former possession of those through whom Wood deraigned title. The plaintiff, in rebuttal, and against the objection of the defendants, was allowed to read in evidence several deeds through which the plaintiff's lessor, Raimond, deraigned titles from James E. Sheldon, the first of which was dated in 1855. The Court below rendered judgment for the plaintiff, and the defendants appealed.

J. M. Wood, in pro. per.

The Court below erred in admitting, against the objection of defendants, any evidence of title in plaintiff's lessor, in rebuttal to proof of title in the defendant Wood.

The issue was not one of title, nor did the issue depend upon the validity of the title which the defendants produced.

The statute does not contemplate that the County Courts may try issues of title, and this action cannot be substituted for the action of ejectment. Even if it were so, the proof in this case shows the paramount title to be in the defendants. Proof of title in the defendants is allowed

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solely for the purpose of showing that the entry was made in good faith, but not for the purpose of trying title. (*Thompson v. Smith*, 28 Cal. 532; *Shelby v. Houston*, 38 Cal. 422; *Hodgkins v. Jordan*, 29 Cal. 578.)

The question as to what constitutes an unlawful entry within the meaning of the statute has been declared to be an entry made in bad faith, without any *bona fide* claim or color of legal right, and not an entry made under claim of title asserted in good faith. (*Shelby v. Houston*, 38 Cal. 422, and the cases there cited.)

John Hunt, Jr., for the Respondent.

If the Court erred in permitting plaintiff to offer to prove title in him to the premises, the error could not injure defendant; first, because if defendants' testimony tended to prove the only defense they relied on, namely, "an entry in good faith, owning the title," it was competent for us to prove the fact that they did not enter in good faith, under the title in fee. If the evidence of defendants' title was irrelevant, and we objected to it upon that ground and the objection was overruled, then our testimony in rebuttal was simply unnecessary, and all that can be said is, that we proved more than enough to entitle us to recover.

A judgment will not be reversed for the admission of improper evidence, which is mere surplusage, and immaterial to the issues. (*Mills v. Barney*, 22 Cal. 240; *Kisling v. Shaw*, 33 Cal. 426.)

By the Court, RHODES, J.:

The plaintiff introduced, in rebuttal, certain deeds, constituting the chain of title (or a part of it) of the plaintiff's lessor. Their introduction is defended here on the ground that they tended to rebut the defendants' evidence, which was introduced to show that their entry was made in good faith owning the title. But the defendants' deeds were introduced, not to show that they owned the title, but that they entered in good faith under claim, and color of title. (*Thompson v. Smith*, 28 Cal. 532; *Shelby v. Houston*, 38 Cal.

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422.) The plaintiff's deeds were not admissible on that or any other ground, consistent with the theory upon which this action proceeds. (*Sanchez v. Loureyro*, 46 Cal. 641.)

The Court found that the defendants, "during the temporary absence of the plaintiff, unlawfully, and without any right so to do, but asserting a claim of title thereto, entered into and upon such premises." It will be observed that it is not found that they asserted a claim of title thereto in good faith. The evidence tends to show — and there is no contradictory evidence on the point — that they entered in good faith, under claim and color of title. If they so entered, the entry was not unlawful within the meaning of the Forcible Entry and Detainer Act. This doctrine was laid down in *Thompson v. Smith*, *supra*, and also in *Shelby v. Houston*, *supra*, in which the action was brought under the third section of the Forcible Entry and Detainer Act of 1866 (Statutes 1865-6, p. 769).

Judgment and order reversed, and cause remanded for a new trial. Remittitur forthwith.

Neither Mr. Chief Justice WALLACE, nor Mr. Justice McKINSTRY, expressed an opinion.

[No. 3,900.]

CHARLES PAVISICH v. LEROY S. BEAN.

NON-JOINDER OF PARTIES DEFENDANT.—When there is a non-joinder of parties defendant, and the defect does not appear on the face of the complaint, the objection must be taken by answer or it is waived. It cannot be taken by a motion for a nonsuit.

COMPLAINT FOR WORK AND LABOR.—An allegation in a complaint, that the defendant was, on a day named, indebted to the plaintiff in a certain sum of money for work and labor before that time performed for him at his request, states of a cause of action.

APPEAL from the District Court, Second Judicial District, County of Tehama.

The complaint contained four counts; one for money

Opinion of the Court — McKinstry, J.

loaned, and three for work and labor performed by the plaintiff and his assignors for the defendant. The third and fourth counts allege that the defendant was, on a day named, indebted to the plaintiff's assignor, in a sum named, for work and labor before that time performed by the plaintiff's assignor for the defendant, under an agreement by which the plaintiff's assignor was to receive a sum named per month.

The answer was a general denial.

The testimony, on the trial, tended to show that one Howard was a partner of the defendant, and that the labor was performed for Howard and Bean. The defendant moved for a nonsuit because Howard had not been made a party defendant. The Court below denied the motion. The plaintiff recovered judgment and the defendant appealed.

P. B. Nagle, for the Appellant, argued that the nonsuit should have been granted, and that the third and fourth counts in the complaint did not state a cause of action, and cited *Frisch v. Caler*, 21 Cal. 71.

J. Chadbourne, for the Respondent, cited *Higgins v. Wortell*, 18 Cal. 333; *Allen v. Patterson*, 8 Seld. 479; and 1 Chitty's Pl. 340, 341.

By the Court, MCKINSTRY, J.:

The answer was a general denial. There was no plea of non-joinder of parties defendant, and the motion for nonsuit was properly denied.

The third and fourth counts in the plaintiff's complaint state a cause of action. (*Wilkins v. Stidger*, 22 Cal. 231; *Abadie v. Carrillo*, 32 Id. 172; *Merritt v. Glidden*, 39 Id. 564.)

Judgment affirmed.

Statement of Facts.

[No. 2,618.]

JOHN W. BRUMMAGIM, ADMINISTRATOR WITH THE WILL ANNEXED OF THE ESTATE OF JACOB C. BEIDEMAN, DECEASED, v. THOMAS AMBROSE.

JUDGMENT OF PROBATE COURT AN ESTOPPEL.—If a purchaser of land at an administrator's sale fails to pay the purchase-money, and for that reason an application is made for a re-sale of which the purchaser receives personal notice and fails to appear, and a re-sale is ordered by the Probate Court, and is made at a less sum than that bid by the former purchaser, and the administrator sues to recover the difference between the two sales, the judgment of the Probate Court ordering a re-sale estops the defendant from setting up or proving in defense, that the administrator made fraudulent representations or defrauded him at the sale: or that the administrator, after the sale, paid him back the ten per cent. deposit, and released him from his bid, and took an assignment of his bid, or that the sale was cancelled by the administrator because he could not give the defendant possession.

IDEM.—A judgment of a Probate Court ordering a re-sale of property sold by an administrator for failure of the purchaser to pay the purchase-money, is conclusive on the purchaser, and estops him as to all matters which might have been litigated there.

APPEAL from the District Court, Fourth Judicial District, City and County of San Francisco.

The plaintiff was the administrator with the will annexed of the estate of Jacob C. Beideman, deceased, and as such, sold at public auction the land belonging to the estate. At the sale, which took place on the 24th day of July, 1867, a tract of land on Polk street, San Francisco, was sold to the defendant for three thousand one hundred dollars, and he paid the required deposit of ten per cent. On the 7th day of August, 1867, the Probate Court confirmed the sale.

The defendant failed to pay the remainder of the purchase-money, and the administrator petitioned the Probate Court to order a re-sale. Personal notice of the application for a re-sale was served on the defendant, but he failed to appear. On the 17th day of January, 1871, the Probate Court ordered a re-sale of the property, and at the second sale it brought only eight hundred and twenty-five dollars. This action was brought on the 10th day of June, 1871, to

Argument for Appellant.

recover the difference between the sums bid at the two sales. The defendant, on the trial, offered to prove that at the time the administrator offered the property for sale, one Reay, who was present, forbid the sale, and declared that he was in possession of and owned the property, and would not give possession to the purchaser, and that thereupon the administrator replied that Reay's statements were untrue; that the title of the estate to the land was valid, and that he would give possession to the purchaser; and that, relying on the statements of the administrator, he made the highest bid, and paid ten per cent. That afterwards he found, on conversing with the administrator, and from other sources, that the statements made by the administrator were untrue, and that Reay owned the property; and that he applied to the administrator, who paid him back the ten per cent., and released him from his bid, and requested that he would make an assignment of his bid to one Belden, the clerk of the administrator, and that he thereupon made such assignment to said Belden for the benefit of the estate, and that the administrator then told him that he was released from any liability upon the purchase. That the plaintiff gave no notice of the application for a re-sale to said Belden; but, at the time he gave notice to the defendant, stated to him that it was merely for the purpose of obtaining a re-sale, and would not cast any liability on the defendant; and that the date of said transfer of said bid was about the 19th day of June, 1868. The plaintiff objected to the testimony as irrelevant and immaterial, and the Court sustained the objection. The defendant also offered to prove that no deed was ever tendered to him by the administrator, and no demand was made on him for the money. The Court also ruled out this testimony. The plaintiff obtained judgment and the defendant appealed.

E. A. Lawrence, for the Appellant, argued that a fraud was committed by the administrator which released the appellant from this sale; and cited *Crayton v. Munger*, 9 Texas, 292, and 2 Story's Eq. section 695.

Morgan & Heydenfeldt, for the Respondent, argued that

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the defendant having had notice of the application for a re-sale, was estopped by the judgment directing a re-sale from pleading or setting up any defense which he might have interposed in the Probate Court on the application for a re-sale; and cited *Embury v. Connor*, 3 Comstock, 511; Const. Art. 6, Sec. 9; *Irwin v. Scriber*, 18 Cal. 499, and *Lucas v. Todd*, 28 Cal. 182.

By the Court, CROCKETT, J.:

All the matters of defense relied upon in this case are concluded by the judgment of the Probate Court directing a re-sale of the property. The defendant was personally served with notice of the application for the order of re-sale, and had an opportunity to defend against it. He has had his day in Court, and if he had appeared and proved to the satisfaction of that Court the facts which he offered to prove on the trial of this action, he would doubtless have escaped the subsequent litigation. But the Probate Court had jurisdiction to adjudicate the whole question of a re-sale of the property; and its proceedings, within its jurisdiction, are to be construed, under our statute, "in the same manner, and with like intendments, as the proceedings of Courts of general jurisdiction; and the records, orders, judgments and decrees of said Courts shall have accorded to them like force and effect and legal presumptions, as the records, orders, judgments and decrees of the District Courts." The defendant was invited before that forum to show cause why a re-sale, at his expense, should not be ordered; and having failed to appear, he is precluded by the judgment from setting up the defenses now attempted. We discover no error in the record.

Judgment affirmed. Remittitur forthwith.

Mr. Chief Justice WALLACE did not express an opinion.

Statement of Facts.

[No. 1,655.]

W. H. PATTERSON v. GEORGE DONNER ET AL.

CONTEMPORANEOUS PAPERS.—When, at the time of the execution of a deed, the grantee executes and delivers to the grantor a writing, in the nature of a defeasance, the two must be read as one instrument, both as between the parties, and as between the grantor and an assignee of the grantee, with notice of the defeasance.

PURCHASER IN GOOD FAITH.—If the grantee executes and delivers to the grantor a defeasance, one who buys from the grantee in good faith, and for a valuable consideration, by virtue of the Registration Act, takes a good title.

WHEN NOT ENTITLED TO EQUITABLE RELIEF.—No person can complain in equity of the fraudulent practices of another, unless he has been injured by such practices.

DEFEASANCE.—If, at the time of the execution of a deed, the grantee executes and delivers to the grantor a writing, stating that he has received the deed as security for money to be paid to him in consideration of his thereafter procuring witnesses to testify to a certain state of facts, it is not a defeasance, and the transaction does not constitute a mortgage.

AGREEMENT AGAINST PUBLIC POLICY.—An agreement to procure witnesses to testify to a certain state of facts, is immoral, and against public policy.

DEED WITH UNLAWFUL CONDITION SUBSEQUENT.—If the grantee, at the time the deed is given, executes to the grantor a writing, stating that if the grantee shall not procure two witnesses to testify to a certain state of facts, the “deed shall be null and void,” and that if the grantee shall procure such witnesses, then the deed shall take effect as a mortgage, the transaction constitutes a conveyance of the legal title with an unlawful condition subsequent.

IDEM.—One who places legal title to land in another, upon an unlawful condition subsequent, cannot recover it by suit at law, or in equity.

ENFORCEMENT OF MORTGAGE.—The person who conveys land upon an unlawful condition subsequent, and then purchases it back, and executes a mortgage for the purchase-money, cannot resist the enforcement of the mortgage on the ground that the condition subsequent was against public policy, or that there was a want of consideration.

COUNSEL FEES FOR FORECLOSING MORTGAGE.—A stipulation in a mortgage, allowing counsel fees for a foreclosure, does not entitle the plaintiff to counsel fees unless he pays them, or at least has become liable for them. The plaintiff cannot, under such stipulation, recover counsel fees for foreclosing his own mortgage.

APPEAL from the District Court, Fourth Judicial District, City and County of San Francisco.

Action to enforce a mortgage given by the defendant Donner to the plaintiff, on the 15th day of March, 1862,

Statement of Facts.

on an undivided five sixths of the fifty-vara lot No. 39, at the corner of Folsom and Second streets, San Francisco. Donner claimed the lot by a grant made to him by Hyde, Alcalde of San Francisco, on the 19th day of July, 1847, and had commenced an action against several persons who were in possession of it to recover possession. It became important to him to prove the existence of the grant. John Yontz had acquired some interest in the lot from Donner, and he and Donner, on the 12th day of October, 1858, executed to P. C. Lander, an absolute deed of the lot. Lander, at the same time, executed and delivered back the following instrument in writing:

“This is to certify that I have received this day from George Donner and John Yontz, a deed for the one undivided one fourth part of one hundred (100) vara lot, number thirty-nine (39) situated in the city and county of San Francisco, State of California, as security for the payment of the sum of twenty-five hundred dollars to be paid out of the first moneys received from the sale of said lot, or out of the first moneys realized by suit, compromise, or otherwise, with parties in possession of said lot, or by sale to other parties; provided, that I do procure two witnesses to testify that they have seen what purported to be a genuine grant of said one hundred (100) vara lot to George Donner, signed by George Hyde, first Alcalde; and, in case I do not procure said witnesses, who will prove said fact, then the aforesaid deed to be null and void. And when said sum of twenty-five hundred dollars shall be paid, then the said one undivided fourth part of said lot is to be reconveyed by me to said George Donner and John Yontz, or to such party or parties as they may designate.

“In witness whereof, I have hereunto set my hand and seal, this 12th day of October, A. D. 1858.

“P. C. LANDER. [SEAL.]”

This instrument was not acknowledged or recorded. The deed was made to Lander because one Swasey was indebted to Lander in the sum of two thousand five hundred dollars, and to secure to Lander Swasey's debt. Lander

Statement of Facts.

remarked at the time that he could not procure the witnesses, but Donner replied that Swasey could. On the 28th of July, 1860, Lander deeded the property to James Ross. Ross became the grantee at the request of the plaintiff, and as the trustee of the plaintiff and Jesse D. Carr, who furnished the money to pay Lander Swasey's indebtedness to him. Ross was an alien, and became the grantee for the purpose of enabling the parties to bring any suit necessary to recover the lot in the Federal Courts. The plaintiff and Carr had agreed to share equally in the property. When Lander deeded to Ross, only six hundred dollars was paid down, but, a few days subsequent, upon the payment of the other one thousand nine hundred dollars, Lander informed Carr of the writing he had given back to Donner and Yontz. Sometime afterwards, S. O. Houghton informed the plaintiff of the writing given by Lander to Donner and Yontz, which was the first information the plaintiff had of its existence. He then proposed to convey to Donner if he (Donner) would give back the mortgage, to enforce which this action was brought. He informed Donner that he did not know of the existence of the writing given by Lander when the deed was given to Ross, and Donner thereupon received from Ross a conveyance, and executed the note and mortgage sought to be enforced in this action. Donner defended in this action on the ground that the note was without consideration, and that the plaintiff fraudulently represented to him that he had no notice of the writing given by Lander. Donner claimed, first, that the transaction between himself and Yontz and Lander constituted a mortgage, and that the plaintiff bought of Lander with full notice, and that the condition in the so-called defeasance was void, as against public policy. The Court below enforced the mortgage and allowed the plaintiff a counsel fee of five hundred dollars. The mortgage, after providing for a sale of the property under a decree of Court, proceeded as follows: "And out of the money arising from such sale, to retain the principal and interest which shall then be due on the said note, together with the costs and charges for advertisement and

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sale of the said premises, and of suit for foreclosure, including counsel fees not to exceed five per cent."

The complaint was signed by *Patterson, Wallace & Stow*, as attorneys for the plaintiff. The plaintiff was an attorney and the other two gentlemen were his partners.

The defendant Donner appealed.

The other facts are stated in the opinion.

J. R. Sharpstein, for the Appellant.

The deed from Donner and Yontz to Lander was absolutely void, and his conveyance to Ross in trust was equally so.

The former deed was by agreement of the parties to be null and void, unless Lander procured two witnesses to testify that they had "seen what purported to be a genuine grant of said one hundred (100) vara lot to George Donner, signed by George Hyde, first Alcalde."

That constituted the sole consideration of the deed. It is an illegal consideration, and void as against public policy. (*Valentine v. Stewart*, 15 Cal. 387, 404-405; *Stanley v. Jones*, 7 Bing. 369, 376-379.)

The consideration that Lander should furnish two witnesses to testify to a material fact in an issue then pending in a Court of justice, is an illegal consideration; and if so, the whole instrument is void. The rule is, that: "If any part of the consideration be *malum in se*, or the good and void consideration be so mixed, or the contract so entire, that there can be no apportionment, the whole instrument is void." (2 Kent, *468; 1 Parsons on Contracts, *379, 380; *Burt v. Place*, 6 Cow. 431; *Scott v. Gilmore*, 3 Taunt. 226; Lord Kenyon in *Moreys v. Leake*, 8 Term, R. 411; *Hinde v. Chamberlin*, 6 N. H. 225; *Frazier v. Thompson*, 3 Watts and Serg. 285; *Leavett v. Palmer*, 3 N. Y. 19, 36, 37; *Taaffe v. Josephson*, 7 Cal. 352; *McKenty v. Gladwin*, 10 Id. 227; *Valentine v. Stewart*, 15 Id. 387, 404.)

It is only in cases of notice after the delivery of the deed that a party is protected to the extent of his payments in good faith. If notice be received before the delivery of the deed, he can claim nothing on the ground of having

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paid a part, or even the whole of the purchase-money before notice. (*Boone v. Chiles*, 10 Pet. 177, 210, 211; *Merritt v. Lambert*, Hoffm. 166; 1 Paige, 280; 5 Little, 62; 1 Mumf. 38; 6 Leigh, 365.)

The deed of Donner and Yontz to Lander, and the defeasance back, constituted a mortgage which did not vest in Lander any estate in the land, either before or after condition broken; and an absolute conveyance of the premises by him amounted to an assignment of the mortgage, the grantee being substituted to the rights of the mortgagee.

"In equity," says Chancellor KENT (4 Com. 142,) "the character of the conveyance is determined by the clear and certain intention of the parties; and any agreement in the deed, or in a separate instrument, showing that the parties intended that the conveyance should operate as a security for the repayment of money will make it a mortgage.

The instrument of defeasance executed by Lander to Donner and Yontz, shows that the deed had been received by the former as security for the sum of twenty-five hundred dollars, to be paid to Lander if he should procure two witnesses to testify to a fact specified in the defeasance.

The condition is precedent, as the mortgage was not to take effect until the condition was performed, and the condition being unlawful, the mortgage was void.

The condition that Lander should procure the two witnesses was the sole consideration of the mortgage, but this being illegal, it would be void even if there were other considerations which were legal; and that whether the illegality be at common law or by statute, as the distinction between contracts to do acts which are *mala prohibita* and *mala in se*, is no longer recognized. (*Chitty on Contracts*, 9th ed. 613; 1 *Story on Contracts*, 4th ed. Sec. 488.)

Patterson, Wallace & Stow, for the Respondent.

Our proposition is that, even as against Lander, Donner could not maintain a right to be relieved touching the conveyance made to him.

The appellant's counsel asserts that "the deed from

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Donner and Yontz to Lander, was absolutely void;" because, as he claims, its consideration "is an illegal consideration, and void as against public policy."

We agree with him that "the consideration is an illegal consideration, and void as against public policy;" but we differ widely with him as to the result which flows from the proposition of law thus admitted between us. The execution and delivery of the deed from Donner to Lander, beyond doubt, placed the legal title in Lander.

Now, it would have required the aid of a Court of Equity, to enable Donner to obtain that legal title from Lander and revest it in himself.. Would Donner be heard in that Court to allege his own turpitude as a ground of relief? Would the Court favor him because his hands were unclean? We have greatly misunderstood the law in this respect, if it would do so.

The defeasance is void — the deed good; the former is an executed, the latter only an executory contract. (*Moseley v. Moseley*, 15 N. Y. R. 334; *Nellis v. Clark*, 4 Hill. R. 426.)

There is a marked and settled distinction between executory and executed contracts of a fraudulent or illegal character. Whatever the parties to an action have executed for fraudulent or illegal purposes, the law refuses to lend its aid to enable either party to disturb. Whatever the parties have fraudulently or illegally contracted to execute, the law refuses to compel the contractor to execute or pay damages for not executing; but, in both cases, leaves the parties where it found them. The object of the law in the latter case is, as far as possible, to prevent the contemplated wrong, and in the former, to punish the wrong done by leaving him to the consequences of his own folly or misconduct. (*Smith v. Hubbs*, 1 Fairf. 10 Maine R. 76.)

In *Doe dem. Roberts v. Roberts* (2 Barnw. & Ald. 367), an action of ejectment was maintained in the Court of King's Bench, upon a deed of conveyance, the consideration of which was void as being a fraud upon the law—"an indictable conspiracy." To the same effect are the following authorities: *Norris v. Norris*, 9 Dana. R. 318; *Westfall v. Jones*, 23 Barb. R. 11.

Reply of Appellant.

Wm. Irvine, also for Respondent.

If the condition of the defeasance is obnoxious to the objection *ex turpi contractu*, it is only because of the rule which grew out of the law against champerty and maintenance; and since the statutes of Henry VIII., in England and here the authorities are uniform to the effect that the feoffer is estopped by his deed.

KENT, C. J., in *Jackson v. Dermont*, 9 John. Rep. 55-59, says: "We mean not, however, to discuss and decide this point in the present case, for even admitting the sale to be an act of maintenance, yet the deed was effectual as between the parties to it. Rufus Lathrop cannot recover in opposition to his deed to Miller. It operates to estop him; and it seems to be a principle which runs through the books, that a feoffment upon maintenance or champerty is good, as between the feoffer and the feoffee, and is only void against him who hath the right (the party claiming adversely and in possession)."

The Court (per BRONSON, J., in *Van Hoesen v. Benham*, 15 Wend. R. 164, 165,) lays down the same rule and cites *Jackson ex. dem. v. Dermont*, and the case of *Livingston v. The Peru Iron Co.*, (9 Wend. 516,) and the same principle is reiterated in *Pepper v. Haight*, (20 Barb. R., 439,) and the case of *Livingston v. Prosens*, (2 Hill, 526, 528,) is also cited to the effect that "it is said to be well settled that as between grantor and grantee, and persons standing in legal privity with them, the deed is operative and passes the title." ALLEN, J., delivering the opinion in *Pepper v. Haight*, says "that it is a principle running through the books that a feoffment upon maintenance or champerty is good as between feoffers and feoffees, and is only void against him who hath the right."

John Reynolds, also for Appellant in reply.

The character of the instrument now under consideration cannot be affected by the fact that Lander did not loan or advance any money to Donner and Yontz.

The assertion in *Chapman v. Turner*, (1 Cal. 252,) re-

Reply of Appellant.

ferred to in 1 Hilliard on Mortgages, page 1, that "a mortgage is always founded on a loan," is declared by that author to be wholly fanciful.

In *Hickox v. Love*, *supra*, it is held not to be necessary that there should be a subsisting obligation to pay on the part of the mortgagor or any one else. I understand that every conveyance made to secure the payment of money, or the performance of any other obligation, and having no other purpose than such security, is a mortgage; and that "whatever its terms," it shall not be deemed a conveyance, so as to enable the owner of the mortgage to recover the possession without a foreclosure and sale. (1 Hilliard on Mortgages, p. 1 *et seq.*; Practice Act, Sec. 260.)

Sharpstein, also in reply.

Respondent admits that the consideration of the mortgage from Donner and Yontz to Lander, was illegal and void as against public policy. He insists, however, that the instrument which we call a mortgage, was a deed in fact. We, on the other hand, insist that it was a mortgage in fact, and never could be treated as a deed by any person who had notice of the defeasance.

He says: "The defeasance is void; the deed is good; the former is an executed, the latter only an executory contract." The vice of this argument is, that it assumes that the two instruments are separate and distinct deeds. A mortgage may be made by an absolute deed and a defeasance back to the grantor, instead of a single conditional deed. (1 Hilliard on Mortgages, 27.) These two instruments must therefore be considered as parts of the same contract, in the same manner as a deed of defeasance forms with the deed to be defeated but one contract, though engrossed on several sheets. (Per PARSONS, C. J. in *Holbrook v. Finney*, 4 Mass. 569.) The condition upon which the land is conveyed is usually inserted in the deed of conveyance, but the defeasance may be contained in a separate instrument. * * * * * The essence of the defeasance is that it defeats the principal deed and makes it void if the condition be performed. (4 Kent's Comm.

141.) Deeds which are part of the same transaction constitute but one instrument. The mortgage in this instance, (for such it undoubtedly is,) consisted of an absolute conveyance, and a bond with a condition to reconvey on the payment of six thousand dollars by the grantor. (C. J. GIBSON, in *Friedly v. Hamilton*, 17 S. & R. 70.)

To say that the mortgagor may or may not record the defeasance, as he pleases, and that if he will not, he thereby agrees that the deed shall be absolute, is to enable a party to make it either a mortgage or absolute deed, at his pleasure; whereas the character of the instruments are indelibly stamped upon them at their original formation, constituting them in law a mortgage with all its incidents; and if it was once a mortgage, it always continues to be so, not liable to be changed in this respect by posterior acts and omissions. (SERGEANT, J., in *Jaques v. Weeks*, 7 Watts, 261, 268.)

In respect to the question raised by respondent, the defeasance in this case must be treated precisely as if it had been inserted in the principal deed, according to the more usual practice. (*Patterson v. Clark*, 15 Johns. 205; *Erskine v. Townsend*, 2 Mass. 497; *Webber v. Patterson*, 7 Humph. 431; *Hammond v. Hopkins*, 3 Yerg. 525; *Colwell v. Woods*, 8 Watts, 188.)

By the Court, MCKINSTRY, J.:

The contemporaneous writing executed by Lander, being under seal, should be read with the deed from Donner, and the two must be held to constitute one instrument, both as between the parties to it, and as between Donner and an assignee of Lander, with notice of the alleged defeasance. By virtue of the Registration Act, however, a grantee of Lander in good faith, and for valuable consideration, would take the legal title, unaffected by any condition or limitation contained in the unrecorded writing.

The defendant alleges that he was induced to accept from the plaintiff a conveyance of the premises, and to execute as security for the purchase-price, the mortgage which this action was brought to foreclose, by reason of

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false representations on the part of the plaintiff, that he (the plaintiff) had no notice of the writing which the defendant had failed to have recorded.

The Court below found that the representations were in fact made, but that they were true; and further found, that in law the plaintiff must be held to have had knowledge of the unrecorded portion of the instrument, because of his relations to Carr, who had actual notice of it before he paid the entire purchase-money to Lander.

No man can complain in equity of the fraudulent practices of another, unless he has been injured by such practices. It is clear, therefore, that if the right or estate derived by the defendant through the deed from the plaintiff, is unaffected by the circumstances that the latter had or had not notice of the contemporaneous writing, he cannot claim that he has been injured by the misrepresentation of which he complains. In this connection it becomes important to inquire what was the legal effect of the whole instrument executed by Lander and the defendant.

We do not think the writing executed by Lander defeated the conveyance of the fee to him. Taken together, the papers do not constitute a mortgage as of their date. It is true, the writing delivered by Lander recites: "I have received this day, from George Donner and John Yontz, a deed for the undivided one fourth part, etc., as security for the payment of twenty-five hundred dollars," etc. But this is immediately followed by the condition: "Provided, that I do procure two witnesses to testify that they have seen what purported to be a genuine grant of said one hundred-vara lot to George Donner, signed by George Hyde, first Alcalde; and in case I do not procure said witnesses, who will prove said fact, then the aforesaid deed to be null and void." The instrument further provides that when the twenty-five hundred dollars should be paid (which was not payable until after the witnesses had been procured and had testified,) then the undivided one fourth part of the lot was to be "reconveyed" to Donner and Yontz, or to such party as they might designate.

There is no recital in the instrument, nor is there any-

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thing upon its face, indicating that Lander had loaned or advanced money to Donner or Yontz. On the contrary, it is plain that it was the illegal and immoral service to be performed which was rated by the parties as of the value of twenty-five hundred dollars, and that the title was to stand as security for that sum only after the unlawful act had been accomplished. Appropriate words of conveyance transferred the legal title to Lander when the deed was executed, and, incorporating the other writing into the deed, there is nothing in the language which constitutes a defeasance. The legal title was conveyed to Lander upon condition subsequent.

The defendant insists, and his defense rests upon the proposition that this condition is immoral, and against public policy. We fully agree that a stipulation that one shall, in consideration of a large sum of money, not only procure witnesses, but procure them to swear to a particular fact, is unlawful. The evidence showed that the illegal service was to be performed by a third person who was indebted to Lander in the sum named; and this removes any imputation of intentional wrong on the part of Lander. But such testimony cannot be considered in construing the instrument, and does not change its legal effect. Assuming the condition subsequent found in the instrument to be against law, the legal estate having once vested in Lander, could not become divested by his failure to perform the illegal stipulation, but became and was absolute. (Co. Lit. 106; 2 Wash. Real Prop. 447; *Weatherby v. Weatherby*, 13 S. & M. R. 687; 4 Kent Com. 130.)

The plaintiff, as grantee of Lander, held the legal title to the premises conveyed, discharged of any condition, since the condition was void but the grant good. It follows that his estate was not limited or affected by the fact that he had notice of the unrecorded portion of the instrument under which he held; and that the defendant acquired every right by his deed from the plaintiff, which he would have derived, had the plaintiff been the purchaser in good faith, within the meaning of those terms as defined by the law. Having placed the legal title in Lander and his grantees upon an

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unlawful condition subsequent, the defendant could never recover the property by suit in law or equity. He re-acquired it by purchase from the plaintiff, and the purchase-price was a sufficient consideration for the mortgage which is the subject of the present action.

The judgment of the Court below should be reduced, however, by the sum of five hundred dollars, fee of counsel for foreclosure. The action was brought and prosecuted by the plaintiff personally. We do not think that the stipulation in the mortgage sued on, for counsel fee, can apply where no counsel fee was paid by the plaintiff.

With this modification the judgment is affirmed, as of January 12, 1874.

RHODES, J., dissenting:

The principal question to be determined in this case is, what is the real nature of the transaction between Donner and Yontz on the one side, and Lander and Swasey on the other? Donner and Yontz wished to procure two witnesses to testify to a certain fact, and it was agreed between all the parties that, if the witnesses should be procured by Swasey, Donner and Yontz would pay therefor the sum of two thousand five hundred dollars, and that the money would be paid to Lander, as Swasey was indebted to him. In order to secure the payment of the money, an instrument, in form a deed of conveyance, was executed to Lander by Donner and Yontz; and thereupon Lander executed to Donner and Yontz the instrument in evidence, which may be called a defeasance. It is therein recited that Lander had received from Donner and Yontz the deed of conveyance as security for the payment of the sum of two thousand five hundred dollars, to be paid as therein mentioned, provided that he (Lander) should procure the two witnesses before mentioned, and that if he should not procure such witnesses, then the deed should be null and void. These two instruments are to be read together, as forming parts of one transaction; and when so read, they clearly constitute a mortgage. The nature of the transaction is not

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changed by the fact that Donner and Yontz did not make an absolute promise to pay the money. If "A." agrees with "B." to perform a certain act, and "B." agrees that upon the performance of the act he will pay "A." a certain sum of money, and executes a conveyance to secure the payment of the money, there is no doubt that the instruments will be construed between the parties as a mortgage. And if "A." promises to pay the money if "B." shall perform the act, the construction is the same. In other words, the question whether an instrument amounts to a mortgage does not depend upon whether the mortgagor absolutely or conditionally promises to make the payment.

In ascertaining whether the transaction amounts to a mortgage, the real nature of the stipulations between the parties must be looked into, and therefrom the intent of the parties is to be ascertained. And if the instrument, which is in form a deed of conveyance, was in fact intended to secure the performance of an agreement on the part of the maker of the instrument, or of some person for whom he undertook to be responsible, it will be held to be a mortgage. So in this case Donner and Yontz promised to pay two thousand five hundred dollars should the two witnesses mentioned be procured, and the deed was given to secure the performance of that undertaking. When an instrument is once determined to be a mortgage, the familiar rule applies: "Once a mortgage, always a mortgage." In determining whether it be a mortgage, the question is not whether the conditions are legal or illegal. It may be admitted that the agreement on the part of Landon or Swasey to procure the two witnesses was contrary to public policy, but that fact does not change the character of the instrument and make a deed of conveyance out of a mortgage. The question of the legality or illegality of the condition is important only when it is attempted to enforce the instrument as a mortgage. It may readily be admitted that if a condition in a deed of conveyance be illegal, the deed will take effect without regard to the condition; but that principle is not involved in this case. If the transaction be found to amount to a mortgage, there is no principle of law, so far as I am

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aware, that will convert it into a deed, by striking out the defeasance, because it contains an illegal condition. I am therefore unable to concur in the opinion of Mr. Justice McKINSTRY.

Mr. Chief Justice WALLACE, having been of counsel, did not participate in the decision of this case.

[No. 10,084.]

THE PEOPLE v. ROACH.

PROOF OF VENUE IN CRIMINAL CASE.—In a criminal case, the prosecution must prove that the offense was committed in the county charged in the indictment.

APPEAL from the County Court, Mendocino County.

The defendant was indicted for a crime alleged in the indictment to have been committed in the County of Mendocino. He was convicted, and appealed.

The other facts are stated in the opinion.

J. B. Lamar and *W. W. Pendegast*, for the Appellant.

The Attorney-General, for the People.

By the Court, NILES, J.:

The record purports to set forth "substantially all the evidence given at the trial." There was no evidence whatever tending to show that the offense was committed in the county of Mendocino, as charged. This omission is fatal. (*People v. Parks*, 44 Cal. 105; *People v. York*, 9 Cal. 421.)

Judgment reversed and cause remanded for a new trial.

Mr. Justice RHODES did not express an opinion.

Statement of Facts.

[No. 3,795.]

JOHN S. GRIFFIN, EXECUTOR OF THE WILL OF JAMES C. WELCH, DECEASED, v. J. J. WARNER ET AL.

SALE OF LAND BY ORDER OF PROBATE COURT.—When a sale of the real estate, left by an intestate, is made by an administrator, and a person other than the purchaser afterwards offers to take the land at a price at least ten per cent. greater than that bid, and the Probate Court for this reason refuses to confirm the sale, it may, in its discretion, either order a new sale or accept the bid of the person who thus offers an increased price.

IDEM.—When, in such case, the Court refuses to confirm a sale, it may continue the matter for further proceedings, and, at a subsequent term, either accept the bid of the person who offers an increased price, or order a new sale.

POWER OF PROBATE COURT OVER ITS ORDERS.—When, in an order of the Court, refusing to confirm a sale of land made by an administrator, because an offer is made of at least ten per cent. more, a clause is inadvertently included declaring the sale null and void, the Court may, at a subsequent term, accept the new bid.

APPEAL from the District Court, Seventeenth Judicial District, County of Los Angeles.

Ejectment to recover a tract of about four acres of land, lying in Los Angeles. On the 5th day of December, 1862, Maria Antonio Clayton died, intestate, leaving surviving her, her husband, Henry Clayton, but no children. At the time of her death the demanded premises were her separate property. In 1863, said Henry mortgaged his interest in the land to James C. Welch, to secure his debt to said Welch. Welch foreclosed this mortgage; and, in 1869, received a Sheriff's deed, and afterwards, in July, 1869, died, leaving a will, in which the plaintiff was appointed his executor. The will was probated, and this action was commenced on the 26th of October, 1869, to recover an undivided one half of the premises. The complaint was afterwards amended so as to include the whole. In January, 1863, letters of administration on the estate of Mrs. Clayton were issued by the Probate Court of San Diego County, to A. S. Ensworth, who, on the 30th day of

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July, 1864, by order of the Probate Court, sold the premises to George Lehman, for the sum of four hundred and ninety-five dollars, subject to the approval of the Court. On the report of the sale to the Probate Court, and on the 26th day of September, 1864, the defendant, J. J. Warner, filed affidavits that the sale to Lehman was for an inadequate price, and offered to give ten per cent. more for the property than it sold for, and the additional costs of sale. The Probate Court thereupon made an order refusing to confirm the sale to Lehman, and an additional clause was inserted in the order, declaring the sale null and void, and continuing the proceedings until the next term of the Court. Ensworth, the administrator, having died, O. S. Witherly was appointed administrator in his stead on the 6th day of January, 1865. On the 19th day of June, 1865, the Probate Court made a further order, reciting that the clause in the former order, declaring the sale null and void, was inserted through inadvertence, and striking it out, and confirming the sale to Warner at his bid. The administrator thereupon executed a deed to Warner. The Court below rendered judgment in favor of the plaintiff for an undivided one half of the premises; but, on the application of the defendants, afterwards granted a new trial. The plaintiff appealed from the order granting a new trial.

Glassell, Chapman & Smiths, for the Appellant, argued that the deed of the administrator to Warner was void, because the Court had annulled the sale to Lehman, and had no power afterwards to accept Warner's bid; and also claimed that the order accepting Warner's bid was made at Chambers, and void. They also argued that the Court had no jurisdiction to proceed with the matter at a subsequent term.

O. Melveny and Brunson, for the Respondent.

By the Court, CROCKETT, J.:

The point made by the appellant that the order of June 19, 1865, was made by the Judge at Chambers and not in

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open Court, is not sustained by the record. Nor was the order void because made after the lapse of the term. On refusing to confirm the first sale, it was in the discretion of the Court either to order a new sale or to accept Warner's bid. (Probate Act, sec. 169.) Instead of doing either, the Court merely vacated the sale, and held it as null and void, and continued the proceedings until the next term. It is admitted that all the proceedings were regular up to the time when this order was entered. The Court still had jurisdiction to order the sale of the land, the proceedings being yet *in fieri*. It is apparent the order was founded solely on Warner's offer to pay a larger price for the land, and not upon any supposed defect or irregularity in the prior proceedings. The legal effect of the order, as we construe it under the circumstances disclosed in the record, was merely a refusal by the Court to confirm the first sale, because Warner had offered a larger price—reserving for future determination the question whether Warner's bid should be accepted or a new sale ordered. Adding to the order the further clause that the sale was null and void, was evidently the result of inadvertence, as is apparent from the subsequent order of June 19, 1865. It would, we think, have been sufficiently clear, however, if the last order had not recited the inadvertence. It is evident from the record, without the aid of the last order, that what the Court intended to declare by the first order, was merely that the first sale was not approved, and the cause was continued for further proceedings. This and nothing more being the legal effect of the first order, the Court had jurisdiction, at a subsequent term, to accept Warner's bid. This disposes of the case, and the other points urged by counsel need not be noticed.

Order granting a new trial affirmed.

Mr. Chief Justice WALLACE concurred specially in the judgment.

Statement of Facts.

[No. 3,180.]

MILES HILLS v. FREDERICK SHERWOOD ET AL.

JUDGMENT AT LAW NOT A BAR TO RELIEF IN EQUITY.—A judgment in ejectment obtained by the grantee of a deceased person against the executors of his estate, even if binding on the creditors of the testator to the same extent that it is binding on the executors, the defendants, is not a bar to a bill in equity filed by the executors or the creditors of the testator, to set aside the deed on which the judgment in ejectment was obtained, as having been made to defraud creditors.

RELIEF IN EQUITY.—A judgment at law against the defendant in ejectment is not a bar to a bill in equity addressed by the defendants in the ejectment to the equity side of the Court, if the relief sought is purely of equitable cognizance.

EQUITABLE DEFENSE IN EJECTMENT.—Although, when the defendants in ejectment are the executors of the estate of the grantor of the plaintiff, they may, perhaps, maintain their possession of the demanded premises on the ground that the deed of the testator to the plaintiff is fraudulent and void as against creditors of the estate; yet they cannot claim a decree annulling the deed, except upon the allegations of a cross-complaint praying for affirmative relief.

IDEM.—Before a case can be considered beyond the reach of a Court of equity, it must be made to appear that the legal remedy would be adequate and complete.

WHO MAY SUE IN EQUITY TO SET ASIDE FRAUDULENT DEED.—A creditor of the estate of a deceased person whose claim has been established, may maintain an action in equity to reach property fraudulently conveyed by the testator, in his life-time.

WHAT RELIEF MAY BE GRANTED IN EQUITY.—When the testator, during his life-time, makes a deed of his land to defraud his creditors, and a creditor of the estate, whose claim is established, files a bill in equity to set aside the deed as fraudulent, and there is no other creditor of the estate, the Court may decree a sale of the property and an application of the proceeds to pay the plaintiff's debt.

JUDGMENT AGAINST EXECUTOR AS EVIDENCE.—A judgment obtained by a creditor of the estate against an executor proves, *prima facie*, the indebtedness of the testator to the plaintiff, as against the grantees of the testator, in a suit in equity to set aside the conveyance of the testator as fraudulent.

EFFECT OF FRAUDULENT CONVEYANCE.—A conveyance made to defraud creditors vests the estate in the grantee, as against the grantor and his heirs and devisees.

APPEAL from the District Court, Third Judicial District, Monterey County.

The case was thus: Maria Josefa Soto and Gil Cano intermarried in California sometime about 1840. Said Cano

Statement of Facts.

died about the month of December, 1844, leaving children by the marriage, Rafael Cano, Nicholas Cano, Luisa Cano, and Guadalupe Cano. Said Maria Josefa, in 1844, after the death of her first husband, intermarried with James Stokes, and there were born children of this marriage, James, Junior, Manuel, Domingo, Catherine, Josephine, William, Henry, Mary, Fanny and Luisa. Said Maria Josefa died intestate, at Monterey County, on the 16th day of September, 1858. The husband of deceased, James Stokes, was appointed the administator of her estate. Said Maria Josefa owned, at her death, as her separate property, the northern half of the rancho Capay, lying in Tehama County, and five hundred acre lot No. 32, in Santa Clara County. James Stokes, the administrator, died testate, September 28, 1864, and before his death had received several thousand dollars from the separate estate of his late wife, Josefa. At the time of his death his accounts, as administrator, had not been settled, and the money still remained in his hands. W. S. Johnson, who had married Luisa Cano, became the administrator of the estate of said Josefa, after the death of James Stokes. Said James Stokes, after his marriage with said Josefa, acquired by purchase the Rancho de Vergeles, in Monterey County, which became the property of the community, and was confirmed to him by the Courts of the United States in 1858. James Stokes, on the first day of December, 1855, conveyed to the plaintiff here, in consideration of the sum of five thousand six hundred and seventy dollars, a tract of land in the County of Butte, called the Cambuston Rancho, and, in the deed, covenanted that if the Mexican title to said rancho should not be finally confirmed by the Courts of the United States before which it was then pending, that he would repay said sum with interest thereon, at the rate of two and a half per cent. per month, from the date of the covenant. The title to the rancho had then been confirmed by the United States District Court, but an appeal had been taken to the Supreme Court of the United States. The latter tribunal, on the 25th of January, 1858, reversed the judgment of the Dis-

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strict Court, and ordered a new trial to be had, upon principles which resulted in its rejection by the District Court, upon the return of the mandate; and, in November, 1859, Stokes, after the death of his wife Josefa, and prior to 1858, married Arabella Clark, and in April, 1858, in order to defraud the plaintiff and prevent him from realizing anything on said covenant, conveyed to Sarah R. Clark, who was the sister of his wife, in trust for his wife, the Rancho de Vergeles; and the said Sarah, at the same time, executed the trust, by conveying the rancho to said Arabella. Stokes, in his will, appointed Frederick Sherwood, who had married his daughter Catherine, and George H. Winterburn, who had married his daughter Josephine, executors of his estate. The executors, after his death, entered into possession of the Vergeles Ranch, and ousted Arabella, the widow of the deceased. She brought an action of ejectment against them, but in their answer they did not set up, as an equitable defense, the fraudulent character of the deed of Stokes to her. The plaintiff recovered judgment. This is the judgment which the Court, in the opinion, speaks of as *Stokes v. Sherwood and Winterburn*. This judgment was rendered in October, 1866. Hills presented his claim on the covenant to the executors of the estate of Stokes for allowance, but they rejected it. He then brought suit against them, and the Court below decided against him. He appealed to the Supreme Court, and that tribunal reversed the judgment of the Court below, and directed judgment for the plaintiff, which judgment was entered upon the filing of the remittitur. The case is reported in the 33 Cal. 474. The plaintiff's judgment against the executors not having been paid, he commenced the present action in equity to have the deed to said Arabella declared fraudulent and void, and to have the Court decree a sale of the land, and an application of the proceeds on his judgment. The executors of the estate of Stokes, the administrator of the estate of Josefa, the children of Josefa by her first husband, Cano, and the children of Stokes, and B. S. Brooks, Augustus D. Splivalo, and Arabella, the widow of Stokes, were made defendants. The

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children and Brooks and Splivalo, claimed an interest in the rancho, which they had acquired from Arabella, with notice of the fraudulent transfer of Stokes to her. The Court below decreed that twenty undivided twenty eighths of the rancho, being all of the same, except what the children of Josefa inherited from their mother, be sold, and the proceeds to be applied to the payment of the plaintiff's judgment. The defendants, Arabella Stokes, Sarah R. Clark, Augustus D. Splivalo, Herbert Stokes, Eveline Stokes and Benjamin S. Brooks, appealed from the judgment.

The other facts are stated in the opinion.

B. S. Brooks, for the Appellants.

The plaintiff, a judgment creditor of the estate of James Stokes, deceased, cannot maintain an action against the appellants, to reach property charged to be fraudulently conveyed by the testator in his life-time, and have the same applied to the satisfaction of his judgment. If the executor neglects or refuses to bring such action, any creditor may maintain an action against the executor, based upon his neglect of duty, and to such an action the fraudulent vendee would be a proper party; but in the absence of any such neglect or refusal, the action cannot be maintained by the creditor. (Probate Act, Sec. 202; *Bate v. Graham*, 11 N. Y. 239; *Babcock v. Booth*, 2 Hill, 186; *Danzey v. Smith*, 4 Texas, 414; *Hogan v. Walker*, 14 How. U. S. 34; *Brockman v. Bowman*, 1 Hill, 338; *Pearley v. Barney*, 1 Chip. 335; *Simpson v. Simpson*, 7 Humph. 277; *Thompson v. Brown*, 4 Johns. Ch. 636.)

The judgment in the case of *Stokes v. Sherwood and Winterburn*, was an estoppel and a bar to this action. The judgment against the executors binds the creditors. It was binding not only upon the said defendants, Sherwood and Winterburn, in their individual capacities as executors of the estate, but bound as well all who were in privity with them as heirs, legatees, devisees or creditors of the estate. In that suit they represented the estate of James Stokes, deceased, and all who were interested in that estate. It, therefore, estops the said Sherwood and Winter-

Argument for Respondent.

burn, and all who are in privity with them, as heirs, legatees, devisees or creditors of said estate, from claiming that the said Rancho Vergeles constituted any part of the assets of the said estate, or that the creditors of said estate have any claim to the same, or any part thereof. (Probate Act, Secs. 114, 194, 195, 250, 259; Civil Practice Act, Sec. 6; *Curtiss v. Herrick*, 14 Cal. 117; *Teschmacher v. Thompson*, 18 Cal. 11; *Halleck v. Mixer*, 16 Cal. 579; *Curtiss v. Sutter*, 15 Cal. 264; *Harwood v. Marye*, 8 Cal. 580; *Meeks v. Hahn*, 20 Cal. 620; *Estate of Woodsworth*, 31 Cal. 604; *Caperton v. Schmidt*, 26 Cal. 490; *Marshall v. Shafter*, 32 Cal. 189; *Valentine v. Mahoney*, 38 Cal. 389; *Tyler v. Houghton*, 25 Cal. 29.)

Fraud, in the conveyance from Stokes to his wife, would have been a perfect defense to the action of *Stokes v. Sherwood*, for, as to the creditor, the deed is absolutely void at law. In such a case, the executors would be in duty bound to bring an action of ejectment to recover the possession; or if they had the possession, it would be their duty to defend that possession and to claim the property as assets of the estate, and that claim, sustained by proof, would be a complete defense at law. (*Bryant v. Bryant*, 2 Robs. Supr. Ct. N. Y. 612; *Canfield v. Monger*, 12 Johns. 347; *Le Guen v. Gouverneur*, 1 Johns. Cas. 491; *Juyne's Case*, 1 Smith Leading Cases, 33; 1 American Leading Cases, 69; *McKee v. Gilcrist*, 3 Watts, 230; *Engelbert v. Blangot*, 2 Whart. 240, 245.)

Wm. Matthews, for the Respondent.

The counsel for the appellants claims that the plaintiff, who is a judgment creditor, cannot maintain this action, but that the action should have been brought by the executors of Stokes.

The learned counsel of appellants has cited numerous authorities in support of this assignment of error, and after a careful examination of the list, I submit that not one of the number sustains his argument. Amongst them no case is found, in which a bill by a creditor against an adminis-

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trator, a fraudulent grantee of a decedent, to annul a fraudulent assignment, or conveyance, has been dismissed.

Justice DENIO, in *Moseley v. Moseley*, (15 N. Y. 334) refused to allow a defendant to show a deed fraudulent, saying: "The defendant is not a creditor, and he does not claim under a title arising out of any proceedings instituted by creditors." (Id. 336.)

Brownell v. Curtis, (10 Paige, 210) was a creditor's bill, seeking, besides other relief, to have a fraudulent cancellation of a debt set aside. The bill was against the perpetrators of the fraud, who were still living; and one of the defenses interposed, was, that the debtor had, before suit, made a voluntary assignment of all his effects to trustees for the benefit of his creditors.

This plea was overruled by the Court, the Chancellor (WALWORTH) saying: "I think he (the debtor) cannot, by an assignment which is wholly voluntary on his part, take away the right of his creditors generally, to set aside the fraudulent transfer, or to recover the debt fraudulently discharged, and transfer that right to his own assignee for the benefit of preferred creditors, or even for the benefit of all his creditors equally." (*Thompson v. Brown*, 4 Johns. Ch. 619; *Manhattan Co. v. Osgood*, 15 Johns. 162; *Bryant v. Bryant*, 2 Robertson, R. J. 612; *Danzey v. Smith*, 4 Tex. 414; *Hagar v. Walker*, 14 How. 29; *Peasly v. Barney*, 1 Chip. 331; *Simpson v. Simpson*, 7 Humph. Tenn. 275; *Bank of United States v. Burke*, 4 Blackf. 141.)

The second error assigned is that the Court should have held the judgment in *Stokes v. Sherwood and Winterburn*, a bar to this action. In answer, the respondent might content himself with saying, that Sherwood and Winterburn were not sued as executors of Stokes, nor did judgment pass against them as executors. That the deed was in fraud of creditors, was not pleaded, and in *Lorraine v. Long*, (6 Cal. 453) and in *Hough v. Waters*, (30 Cal. 311) it was declared that unless matters of equitable cognizance were pleaded, the judgment at law was not a bar to a bill addressed to the equity side of the Court. And in the latter case they say, that *Morrison v. Wilson*, and *Gray v.*

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Dougherty, cited by counsel, are not when rightly understood in conflict with this view. In *Ayres v. Bensley*, (32 Id. 620) the question was again considered, and, after it was fully debated by counsel, the same doctrine was re-affirmed.

By the Court, MCKINSTRY, J.:

The defendant claims that the judgment in *Stokes v. Sherwood and Winterburn* is a bar to the present action.

For the purposes of this opinion it may be admitted that the judgment would bind the creditors of the estate of James Stokes to the same extent as the executors themselves would be bound; and that the defendants in ejectment would have been permitted to attack the deed made by the testator in his life-time, as made in fraud of his creditors. If, however, the matter relied on or relief sought is peculiarly of equitable cognizance, the judgment at law is not a bar to a bill addressed by the defendants in the ejectment, as plaintiffs, to the equity side of the District Court. (*Lorraine v. Long*, 6 Cal. 453; *Hough v. Waters*, 30 Cal. 309; *Ayres v. Bensley*, 32 Cal. 620.)

The general rule is that the jurisdiction in equity is limited to cases where there is no remedy at law, or none that is plain, adequate and complete. The application here is made in a case where the jurisdiction is, to some extent, concurrent, but where the peculiar remedy sought cannot be administered in a Court of law. The defendants in ejectment would perhaps have been able to maintain their possession, on the ground that the deeds of the testator and of Sarah R. Clark were void as against creditors; but they could not have obtained a decree annulling the deeds as against the creditors, except upon the allegations of a cross-complaint praying affirmative relief. "Before the case can be considered beyond the reach of a Court of equity, it must be made to appear that the legal remedy would be adequate and complete." (*Hager v. Shindler*, 29 Cal. 55.)

Appellants also contend that the plaintiff — as judgment creditor of the estate of James Stokes, deceased — cannot

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maintain an action to reach property fraudulently conveyed by the testator in his lifetime.

It was at one time much disputed whether an administrator could set aside a fraudulent conveyance of the personality by the intestate; and, under our system, a fraudulent conveyance of the realty would stand upon a like footing. But the right of the executor or administrator to maintain suit was settled by sections two hundred and two and two hundred and three of the Probate Act. Those sections provide that the executor or administrator may (on the application of a creditor, who shall give security for costs and expenses) prosecute any proper action with reference to such fraudulent conveyance.

The purpose of the statute is accomplished by empowering the executor or administrator to prosecute the suit. It does not purport to exclude the creditors from bringing it, if they are authorized so to do by the general law. "The creditors have their remedies independently of the administrator; for a fraudulent donee, taking or keeping possession of the goods, is at common law liable as executor *de son tort*; and the creditors are entitled to go into equity against the property in the hands of the fraudulent grantee." (1 American Leading Cases, fourth edition, 43.)

The conveyance from James Stokes to his wife vested in her—as against the grantor and his heirs or devisees—his whole estate in the land conveyed. (Act concerning fraudulent conveyances, Sec. 20; *Bank of U. S. v. Burke*, 4 Blackf. R. 141.) Except for the sections of the Probate Act above referred to, the executor could not render available or reduce to assets that which the testator could not demand or recover; nor would the Probate Court have any control of the fund arising out of a sale of the property fraudulently conveyed. I express no opinion as to whether, if it appeared that there were other creditors than those who initiated the proceedings, the District Court would confine itself to annulling the conveyances as against all the creditors. Here it does not appear that there is any other creditor, and there can be no reason why a Court of equity should not decree a sale of the premises and an application of the proceeds to the plaintiff's debt.

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The judgment against the executor proves the indebtedness *prima facie* in favor of the plaintiff as against the grantees of the testator. (*McLaughlin v. Bank of Potomac*, 7 How. U. S. R. 221.)

Judgment and order denying motion for new trial affirmed.

[No. 4,246.]

THOMAS S. MILLER v. GEORGE F. SHARP.

COMPLAINT IN PARTITION.—The complaint in partition must set forth specifically, so far as known to the plaintiff, the interests of all persons in the premises sought to be partitioned; and if the defendant has two deeds, each purporting to convey an undivided two thirds of the property, and one of them was given as a substitute for the other, that fact must be averred, and if not averred, the plaintiff cannot prove it.

APPEAL from the District Court, Third Judicial District, City and County of San Francisco.

The Court below found that the parties were tenants in common, in the proportion of, plaintiff one third and defendant two thirds, and made an interlocutory decree for a partition. The defendant appealed.

The other facts are stated in the opinion.

G. F. & W. H. Sharp, for the Appellant.

P. B. Ladd, for the Respondent.

By the COURT:

The statute concerning partition requires that the complaint should set forth the interests of all persons specifically and particularly, so far as known to the plaintiff. (Code Civ. Proc. Sec. 753.) Had the plaintiff observed this rule of pleading, he might have averred in his complaint that the second deed delivered by him was intended as a substitute for a former deed for the same interest, and which was supposed to have been lost; and that the two thirds

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interest of the defendant was really derived only through the deed first delivered by the plaintiff. He, however, did not pursue this course, but set forth generally that the defendant and himself were tenants in common in fee of the premises, in the proportion of one third in himself and the remaining two thirds in the defendant. The defendant denied the alleged tenancy in common *in toto*.

On the trial, it having appeared that the entire estate had apparently vested in the defendant by reason of two several conveyances made to him by the plaintiff, each purporting to convey an undivided two thirds, the plaintiff was permitted, against the objection of the defendant, to show that the deed second in order of delivery was intended only as a substitute for the first, and not to convey any interest in the land additional to that vested by the first deed.

The objection should have been sustained. The statute concerning partition (Section 759) provides that the rights of the several parties, plaintiff as well as defendants, may be put in issue, tried, and determined, but it does not provide that rights such as these may be tried or determined without being put in issue.

Judgment reversed, without costs, and cause remanded for further proceedings. Remittitur forthwith.

[No. 8,738.]**CLEMENTE COLUMBET v. JUANA PACHECO ET AL.**

DIVISION FENCE — ESTOPPEL.— When a fence is built for a division fence, and is acquiesced in as such for sixteen years, the parties are estopped from controverting the correctness of its location.

APPEAL from the District Court, Third Judicial District, County of Santa Clara.

Ejectment to recover the land on the plaintiff's side of the division fence, which the defendant claimed was included within the limits of the land measured to her by the

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Alcalde. The plaintiff recovered judgment and the defendant appealed.

The other facts are stated in the opinion.

Wm. Matthews, for the Appellant.

D. M. Delmas, for the Respondent.

By the Court, CROCKETT, J.:

The controversy in this case is as to the location of the dividing line between the lots of plaintiff and defendants; and it appears from the findings that as early as the year 1818, a division fence was erected to replace a former fence which had gone to decay. This fence included the premises in controversy within the inclosure of the plaintiff's grantors and predecessors in interest. There is nothing to show that from 1818 to 1866 there was any controversy in respect to the location of the fence, or that it was not acquiesced in as the proper dividing line between the two lots. On the contrary, the Court finds that it "remained as a division fence between these lots until the summer of 1866." But in June, 1846, the defendant, Juana Pacheco, presented her petition to the Alcalde, setting forth that "in virtue of having the solar of my house and land, which follow in depth to the acequia, eighty varas, and in front forty; all bought by my deceased father from deceased, Ygnacio Vallejo, and which papers (deeds) of sale have been mislaid. I hope you will be pleased to extend to me the possession of the same." It appears from an endorsement on the petition, made by the Alcalde on the following day, that he proceeded to the house of the petitioner with the necessary witnesses, "and proceeded to the measurement by the front of her house, and there were measured forty varas; and in depth eighty up to the acequia; * * * and there being no opposition whatever, possession was given to her, which she asked as evidence, and the Judge of said pueblo gives it as having passed upon it as aforesaid; and that the measurements of the solar were fairly made by the measurers, and that it

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may appear in all time and place, the assisting witnesses sign by the present Judge." The document is signed by the Alcalde and the witnesses, and was properly recorded in the Alcalde's books. The defendants contend that this was a grant, operative to vest the title; or, if not in terms a grant, that it is evidence of a previous grant. It is said that under the Mexican law an act of juridical possession is equivalent to the livery of seizin at common law, and presupposes a prior grant. But we do not find it necessary to determine the legal effect of the instrument, nor whether it was translativ of title, or evidence of a prior grant. In whatever aspect it may be viewed, the fact remains that from 1846 to 1866, a period of twenty years, the division fence erected in 1818 continued to be the division fence, without controversy, so far as this record shows. It appears to have been acquiesced in as the proper dividing line between the lots. The plaintiff testified that in 1851, he and the defendant, Juana Pacheco, at their joint cost, renewed the fence, and that he remained in possession of the land in dispute until 1866, when the fence was removed during his absence, and without his consent. On the other hand, the defendant, Juana Pacheco, testified that the fence of 1851 was built by her at her sole expense, and by mistake was located too far to the south, and that when she discovered the mistake she had not the means to remove it prior to 1866. It was for the Court below to decide upon the credibility of the witnesses, and the finding was for the plaintiff on this point. Assuming, as we properly may, that at least from 1851 to 1866 the location of the fence, as a dividing line between the lots, was acquiesced in by the co-terminus owners, the defendants are estopped from controverting the correctness of the location. (*Sneed v. Osborn*, 25 Cal. 619; *McCormick v. Barnum*, 10 Wend. 104; *Adams v. Rockwell*, 16 Wend. 286, 302; *Perkins v. Gray*, 3 Serg. & Rawle, 132; *Hagey v. Detweiler*, 35 Penn. 412.)

Judgment and order affirmed. Remittitur forthwith.

Mr. Justice McKINSTRY did not express an opinion.

Argument for Appellant.

[No. 4,305.]

**THE SAN FRANCISCO AND NORTH PACIFIC
RAILROAD COMPANY v. FREDERICK A. BEE
AND E. LATAPIE.**

PROPERTY OF A CORPORATION.—The property of a railroad corporation is vested in its trustees, to be preserved by them as a fund to secure the creditors of the corporation.

FRAUDULENT CONVEYANCE BY A CORPORATION.—If the persons, interested in one railroad corporation, form a new one, which chooses for its officers the officers of the old corporation, and the persons owning the stock of the old corporation receive, in exchange therefor, stock of the new, and the trustees then cause the property of the old corporation to be conveyed to the new, the conveyance is a fraud upon the creditors of the old corporation.

EQUITY DOES NOT RELIEVE THOSE WHO HAVE BEEN GUILTY OF FRAUD.—The party who comes into a Court of Equity to enjoin a sheriff from selling real estate on an execution against the plaintiff's grantor, cannot obtain relief, if his purchase is tainted with fraud.

APPEAL from the District Court, Twelfth Judicial District, City and County of San Francisco.

The defendant Bee had been in the employ of the San Francisco and Humboldt Bay Railroad Company, and sued them for his services. The case went to the Supreme Court, and is reported in the 46 Cal. p. —. He obtained a final judgment on the 21st of November, 1872, and on the 18th of September, 1873, obtained an execution on his judgment, which was placed in the hands of the defendant Latapie, who was Sheriff, and he advertised the ten miles of railroad, mentioned in the opinion, for sale. This action was commenced to enjoin the sale. The plaintiff recovered judgment, and the defendant appealed.

The other facts are stated in the opinion.

Douthitt and McGraw, for the Appellant.

The deed in question is void, because a railroad company cannot convey all its property. It was held in *Miners Ditch Company v. Zellerbach* (37 Cal. 543) that a mining corporation could do so, and it was so held on the authority

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of Massachusetts cases (see pp. 591-593). In that case, this Court is careful to limit their decision to the class of corporations there in question (see pp. 577, 578, 589, 590, 591, 592); and in the same State of Massachusetts, the doctrine we contend for is fully recognized and directly held, (*Commonwealth v. Smith*, 10 Allen, 456) in which the Court directly holds that a railroad may not sell its road; "a manufacturing company may sell its mill, and buy another, but a railroad company cannot make a new railroad at pleasure."

We refer the Court to that case for a full discussion of principles and authorities.

Our statute makes the same distinction. Manufacturing, mining, mercantile, wharfing, trade, business and commercial corporations, are authorized to "purchase, hold, sell and convey, such real and personal estate as the purposes of the corporation shall require." (1 Hitt. Dig. Sec. 935, subdivision 3.) A railroad company is authorized: 1st. To convey any real estate held by voluntary grant or donation. (1 Hitt. Sec. 842, sub. 2.) 2d. To purchase, enter upon, and hold (but not convey), any land necessary for the construction of the road. (1 Hitt. Sec. 842, sub. 3.) 3d. To receive and convey any other property necessary for the construction and convenience of the road, "in order to transact the business usual to such railroad companies." (1 Hitt. Sec. 842, sub. 8.)

The deed is void, because there was no power conferred on the president and secretary to give away the property. The resolution of the directors gave them power to sell, but not to donate.

The attempted ratification of the stockholders was a ratification of a sale, not a gift, but was utterly void for any purpose, as it was passed at a special meeting, not called according to law, or the by-laws of the company.

The statute and the by-laws each required that a special meeting of stockholders should be called by a number of stockholders, owning not less than one third of the stock, upon thirty days' public notice in a newspaper, which notice should state the particular object of such meeting.

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No other business than that mentioned in the notice could be transacted. (1 Hitt. Dig. Sec. 831.)

In this case, at a meeting of stockholders held without any notice, and in which it does not appear that a majority of the stock of the company was represented, an attempt was made to ratify a deed given the same day.

The deed is void as against creditors of the S. F. & H. B. R. R. Co., for the reason that it was a sale by the directors to themselves, under another name. (*San Diego v. S. D. & L. A. R. R. Co.* 44 Cal. 106; *Goodin v. C. W. Canal Co.* 18 Ohio State, 182; *P. Star Lodge v. P. Star Lodge*, 16 La. An. 76; *Aberdeen R. R. Co. v. Blakie*, 1 McQ. 471.)

The deed is void as against creditors of the San Francisco and Humboldt Bay Railroad Company, because the arrangement and understanding which resulted in the deed, were a violation of law, and particularly of 1 Hittel, Sec. 758. There was no consideration paid by the one corporation to the other. The only consideration that passed was that the San Francisco and North Pacific Railroad Company gave its certificates of stock to the stockholders of the San Francisco and Humboldt Bay Railroad Company, but nothing was paid to the latter company as a corporation. It is true, a consideration was intended, to wit: that the San Francisco and North Pacific Railroad Company was to pay the debts of the San Francisco and Humboldt Bay Railroad Company, but that intention was never expressed by the San Francisco and North Pacific Railroad Company as a corporation in such a way that the liability could be enforced against them on account of a promise to pay. The whole transaction cannot be distinguished from that declared void as to creditors, on the ground that it was in effect a distribution of the capital stock in the shape of dividends, in violation of the section just above referred to. (*Martin v. Zellerbach*, 38 Cal. 300.)

Daingerfield & Olney, for the Respondent.

We cannot fully appreciate the force of the point made by appellants, viz: "The deed in question is void, because a railroad company cannot convey all its property." If it

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be good law that in conveying ten pieces of property which I may own, a mis-description of one be made in the deed, the whole conveyance fails, then there may be something in the point; but we imagine no one is bold enough to contend for such a proposition. But we shall contend and show, by reason and authority, that a railroad company can sell everything it possesses, except perhaps the franchise. In the *Miners' Ditch Co. v. Zellerbach* (37 Cal.) it was held that a mining corporation could do so, and there can be no reason why a railroad company, before they build their road, cannot sell everything they possess, for it is not compelled to build a road, and public policy cannot forbid it, for the reason that the public has no interest in a railroad until it is built; and every case in the books, wherein it is decided that a railroad company cannot sell its road, we venture to assert, has reference to an actual running road. This road was not a railroad, but a bed which was being prepared for a railroad. The case of *Commonwealth v. Smith* (10 Allen, 456), cited by appellants, was an actual railroad in operation.

We contend further, on this subject, that unless there are express words of prohibition restraining a corporation from making a sale, it has the same power that an individual has, and may sell anything which is not against public policy to dispose of. (2 Kent's Com. 2d ed. 281; Cormyn's Digest, Franchise F. 11-18; Kyd on Corporations, 108; Angell & Ames on Corporations, 2d ed. 125; *People v. Canal Commissioners*, 5th Denio, 401.)

They can dispose of both land and chattels. (*Barry v. Merchant's Exchange Co.* 3 Daly, 271; Angell & Ames on Corporations, Secs. 187, 188, 191.)

This is the law on the subject, for we have failed to find any legislative prohibition.

But whilst we contend that a railroad line may be sold before completion, by its directors, to a new company for the purpose of building a railroad for the use of the public, or, indeed, for any other purpose, we insist that a railroad in use cannot be sold under execution by the Sheriff; for, the public having an interest in it, it is against public

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policy for a corporation or an officer of the law to destroy the franchise. (Section 242, Vol. 2 Redfield on Railways, and cases cited; Sec. 235, Id.)

The Legislature must prescribe the manner of collecting debts against a corporation. (Id. cited.) It has failed to do so, specially in regard to railroads, unless this should be held to be a toll road, as appellants contend, and if so the defendants totally failed to comply with the law in levying the execution of *Bee v. The S. F. & H. B. R. R. Co.*

If the railroad can be sold, it must be the whole road. (*Coe v. Columbus, Piqua & Indiana R. R. Co.* 10 Ohio.)

That the whole property, except the franchise, can be sold, is shown by *Miners Ditch Co. v. Zellerbach*, 588 *et seq.*, Id. 575; 3 Sand. 161; 1 Sand. 629; 1 Sand. Ch. 293, 295, bottom page; 17 Barb. 378.)

By the Court, WALLACE, C. J.:

The property levied upon to satisfy the judgment of Bee against The San Francisco and Humboldt Bay Railroad Company is admitted to have been formally the property of that company. The judgment of Bee was rendered in November, 1872 (upon an indebtedness existing as early as July, 1869), and the execution thereon, issued in September, 1873, was levied upon property claimed by the corporation plaintiff in this suit, The San Francisco and North Pacific Railroad Company, and described in the complaint as follows: "The road-bed for a distance of ten miles north, commencing at Petaluma, being all the lands or real estate, and all the bridges, embankments, excavations, viaducts, culverts, trestlework, and other superstructures and constructions, along the line of the San Francisco and North Pacific Railroad, all in the county of Sonoma, State of California."

The complaint alleges that the corporation plaintiff, for a valuable consideration, purchased this property from The San Francisco and Humboldt Bay Railroad Company, and on the 17th day of November, 1869, obtained from the latter corporation a deed of conveyance, convey-

the Court below found the fact upon this point as follows: "That on the 17th day of November, 1869, the plaintiff, for a valuable consideration, purchased of the San Francisco and Humboldt Bay Railroad Company, the property described in the complaint; and said plaintiff then became, ever since has been, and still is, the exclusive owner thereof." A decree having been thereupon entered in that Court, perpetually enjoining the defendant Bee from causing the said property to be sold in satisfaction of the judgment he had obtained, this appeal was taken; and one of the points made for the appellant is that this finding is not supported by the evidence. It appears that in March, 1868, The San Francisco and Humboldt Bay Railroad Company was incorporated, and became the owner of the property in controversy. This corporation seems never to have been dissolved, but is yet *in esse*. On the 16th day of November, 1869, the corporation, plaintiff here, was attempted to be organized, and for the purposes of this decision we will assume was in fact organized, and, as described in its articles of incorporation, its road included the road which was already owned and in process of construction by the San Francisco and Humboldt Bay Railroad Company, and subsequently levied upon under the execution already referred to. Its officers were the same persons who were the officers of the San Francisco and Humboldt Bay Railroad Company, and its stockholders were also substantially the stockholders of the latter company, each stockholder receiving stock of the new corporation corresponding in amount with stock held by him in the old one. As observed already, the organization of the new corporation was effected on the 16th day of November, 1869, on which day its articles of incorporation were filed in the office of the Secretary of State. On the 18th day of November, 1869, some three days previous, a resolution had been adopted by the Board of Directors of the San Francisco

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and Humboldt Bay Railroad Company authorizing the President and Secretary of that corporation to sell and convey, on such terms as they might deem expedient, all or any of its property; to execute and deliver all writings and conveyances necessary to that end and to affix the corporate seal thereto. Accordingly, on the 17th day of November, 1869, the next day after the organization of the corporation plaintiff, an indenture reciting this resolution and purporting to be in pursuance thereof was executed by the President and Secretary therein referred to, and delivered to the corporation plaintiff here, as grantee thereof. It recited a consideration of twenty thousand dollars paid in hand, and purported to convey to the corporation plaintiff the railroad in process of construction by the corporation grantor, including the road and property in controversy in this suit. It is not claimed now, as we understand it, that in point of fact any portion of the recited consideration, or any other consideration, was paid at the time, or afterwards, except that at some time, subsequently to the delivery of the deed, the grantee therein, or its President, extinguished some seven or eight hundred dollars of the indebtedness of the corporation grantor by the payment of fifty cents upon the dollar, and exacting from the creditor "a clean receipt for the whole amount." These are substantially the facts held by the Court below to amount to a purchase and sale for a valuable consideration, and one which in equity vested in the corporation plaintiff a title to the property superior to the claim of the defendant Bee, to have it applied in satisfaction of his debt.

In *Martin v. Zellerbach* (38 Cal. R. 300) it was held here that the property and assets of a corporation are vested in its trustees, to be preserved by them as a fund to secure the creditors of the corporation. By the thirteenth section of "An Act concerning corporations" (Acts 1850, 348) it is provided in substance that until its dissolution and the payment of its debts, it shall not be lawful for the trustees to make any dividend except from the surplus profits arising from the business of the corporation, nor to divide, withdraw, or in any way pay to the stockholders, or any of

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them, any part of the capital stock of the company. The capital stock and the assets of the San Francisco and Humboldt Bay Railroad Company, therefore, constituted a fund, devoted by law to the payment of the debt to Bee, and the debts of that corporation, if any, to other persons; and it was certainly not competent to the members of that corporation to dissipate this fund and place it beyond the reach of creditors by merely going through the process of re-incorporation, taking on a new corporate name, transferring the assets of the old corporation to the new one without consideration, and issuing the capital stock in the new corporation to the holders of the capital stock of the old corporation. This transaction involved a breach of positive statute law. It was the dividing of the capital stock of the old corporation — the withdrawal of its assets, to the injury of its creditors — which is forbidden by the statute, and it should not be countenanced or aided by a Court of equity.

Judgment reversed and cause remanded, with directions to dismiss the action. Remittitur forthwith.

Mr. Justice McKINSTRY did not express an opinion.

[No. 4,233.]

EARL BARTLETT, EXECUTOR OF THE WILL OF GEORGE LUMLEY, DECEASED, v. CHARLES H. AITKEN.

DAMAGES FOR REFUSAL TO RECONVEY LAND.—An action will not lie to recover damages for the breach of a verbal contract to reconvey real estate, formerly conveyed by the plaintiff to the defendant.

APPEAL from the District Court, Fourth Judicial District, City and County of San Francisco.

The complaint alleged that George Lumley, in his lifetime, borrowed two hundred dollars from the defendant, and gave him his note for it, and, to secure the note, gave the defendant an absolute deed of a lot in San Francisco.

Points decided.

That Lumley, when the note fell due, tendered the money and a deed of reconveyance ready to be executed, and demanded a reconveyance, and that the defendant refused the money and to reconvey. That since then the defendant had sold the lot to one Kerr, who bought in good faith and without notice. Damages were claimed in the sum of one thousand dollars. The Court below sustained a demurrer to the complaint and the plaintiff appealed.

E. Bartlett, for the Appellant.

T. B. Bishop and *Wm. H. Fifield*, for the Respondent.

By the Court.

The plaintiff seeks to recover damages for a breach of a verbal contract to reconvey real estate. No such action can be maintained at law.

If it be claimed that the conveyance from plaintiff to defendant was intended as a mortgage, the former must apply to a Court of equity so to declare.

Judgment sustaining the demurrer to the amended complaint is affirmed.

[No. 3,701.]

GEORGE HAGAR v. JONAS SPECT ET AL.

LIMITATION OF ACTIONS.—The Statute of Limitations in relation to land claimed under a Mexican grant which requires confirmation does not commence running until a patent is issued by the United States.

IDEM.—A possession, in order to confer a title to land under the Statute of Limitations, must be continuous for the full period of five years.

OFFERING DEED IN EVIDENCE.—If a deed of a tract of land contains a clause excepting from its operation such portions of the tract as had previously been conveyed by the grantor, the grantee, in ejectment to recover a parcel of the tract, may introduce it in evidence, without previously proving that the premises in controversy had not been conveyed by the grantor when the deed was given.

APPEAL from the District Court, Tenth Judicial District, County of Colusa.

Statement of Facts.

Ejectment to recover a lot in the town and County of Colusa. The plaintiff claimed under the Jimeno grant, and the defendants under the Colus grant. The general facts in relation to these conflicting grants are stated in the cases referred to in the opinion. The complaint averred the ouster to have taken place on the 2d day of February, 1870. The transcript does not show when the suit was commenced, but an amended complaint was filed December 7, 1870. The final survey of the Jimeno grant was approved on the 6th day of April, 1861. The Court below found the following facts in relation to the plea of the Statute of Limitations interposed by the defendants: In 1850, C. D. Semple, who had purchased the Colus grant from John Bidwell, entered on the land under his deed, and laid out the town of Colusa into lots and blocks and streets, and lived afterwards in the town, sometimes on one lot, and sometimes on another, but did not at any time have actual possession of the lot in controversy. Hagar, the plaintiff, after 1857, lived in the town, and had possession of some of the lots, claiming to hold the same under the Jimeno grant, but did not have possession of the lot in controversy. In 1859, one Melarkey entered upon the lot in controversy under a deed from one Shepardson, and moved into a house standing on it, and built a fence around it. On the 20th of May, 1861, Semple conveyed it to Melarkey. Melarkey lived on the lot till the spring of 1863, when he went to the State of Nevada. From 1863 to 1866, several persons occupied the house and lot for different periods, but no one entered or occupied under Melarkey. In 1866, the house and fence were removed from the lot, and it remained open and unoccupied till January, 1870, when the defendant Spect entered and commenced erecting a building thereon. He deraigned title from Melarkey through several mesne conveyances. The other defendants were tenants of Spect. A. C. Whitcomb acquired from the grantees the title to the southern nine leagues of the Jimeno grant, and, on the 9th day of March, 1857, conveyed to the plaintiff Hagar. The deed contained a reservation in the following words: "But it is expressly understood and agreed that this deed

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is made and taken without any covenants of title or warranty, either express or implied, on the part of the said party of the first part, and that it is subject to any conveyances heretofore made by him of any portion of, or interest in, the said tract of land, or any part thereof." The deed was signed by both the grantor and the grantee. When the plaintiff offered this deed in evidence, as a part of his chain of title, the defendants objected, as stated in the opinion.

The other facts are stated in the opinion.

F. L. Hatch, for the Appellants.

W. C. Belcher and *W. F. Goad*, for the Respondent.

By the Court, RHODES, J.:

This case again presents the conflict between the titles to the Jimenos and the Colus ranchos. The evidence in the record is substantially the same as was presented in *Treadway v. Semple*, 28 Cal. 652; *Semple v. Wright*, 32 Cal. 659; *Yates v. Smith*, 40 Cal. 662, and *Semple v. Ware*, 42 Cal. 619. In each of those cases it was held that in respect to the land covered by the survey of both ranchos, the Jimeno was the better title. The grounds upon which the decisions in those cases rest, need not be again considered or even repeated. Those authorities should be regarded as having definitively settled the question of the relative value of those titles.

The defendants failed to sustain their plea of the Statute of Limitations. Whatever may have been the effect of Semple's constructive possession, it is manifest that it did not continue after May 20, 1861, when he executed a deed conveying the premises to Melarkey, the latter being then in the actual possession. The patent for the Jimeno rancho having issued July 18, 1862, the defendants, under the authority of *Gardner v. Miller* (47 Cal. 570), cannot compute, as a portion of the statutory period, the time which elapsed before that date. After that date, the possession of the defendant's grantors was not continuous for the full

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period of five years, and therefore was unavailing. (Sec. 318, Code Civ. Proc.)

The defendants objected to the admission in evidence of a deed of conveyance made by Whitcomb to the plaintiff, on the ground that it excepted such portions of the rancho as had previously been conveyed by Whitcomb; and that the plaintiff had not proved that the premises in controversy had not been previously conveyed to other persons. It is unnecessary to determine whether the clause of the deed in question creates an exception; for, admitting that it is so to be construed, and that the plaintiff must make it appear that the premises in controversy are not within the exception, there is no rule requiring such proof to be made before the introduction of the deed, and it would be more orderly to adduce such proof after the admission of the deed in evidence.

Judgment and order affirmed. Remittitur forthwith.

[No. 2,033.]

**PATRICK ROBINSON AND HANNAH ROBINSON, HIS
WIFE, v. THE WESTERN PACIFIC RAILROAD
COMPANY.**

NEGLIGENCE OF RAILROAD COMPANY IN CASE OF INJURY TO A PERSON.—

If the track of a railroad passes along the street of a city, crossing another street, and a train of cars is stopped in the first street so that the last car in the train stands in the cross-street, and while a person is walking along the cross-street over the track, behind the train, the train, without any notification, is suddenly backed, and the person is knocked down and injured by the cars, the employees of the company are guilty of gross negligence.

IDEM.—The person injured in such case is exercising an undoubted right in crossing the railroad track on a public street, and is not guilty of such want of care or diligence as contributes to the injury, and the railroad company is not released from liability on the ground of contributory negligence.

IDEM.—The person injured in such case had a right to presume that he would be notified that the train was about to move, and was not bound to wait because the train was on the street, or assume that it might move suddenly backward without notice.

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IDEM.—If the bell of the train was rung, this does not of itself establish proper care by the employes of the company; for, although the bell is intended to give notice to all, it is the duty of the engineer to see that all have acted on the notice.

IDEM.—In such case, the railroad company should provide a lookout, upon whose signal, that the track was clear, the engineer should have acted.

IDEM.—It is no defense to an action for the injury in such case, that the plaintiff, by his own act, has contributed to his injury, but it must appear that by his own fault he has so contributed.

IDEM.—The fact that the agents of the defendant in such case did not know that the person injured was on the track, amounts to culpable negligence on their part.

RIGHT TO THE USE OF PUBLIC STREET.—A foot-passenger is not debarred the use of the street because a train of cars occupies a portion of such street.

CONTRIBUTORY NEGLIGENCE RELEASES DEFENDANT.—If the neglect of ordinary care by the plaintiff concurs as a proximate cause in producing the injury for which the action is brought, the railroad company is not liable, even if its agents are at fault.

ERROR WHICH DOES NO HARM.—If the Court, in its charge to the jury, lays down an erroneous principle of law, based on a supposed fact in the case which was not proved, and which the jury could not have found, the other party is not injured by the instruction, and a new trial will not be granted.

EXCEPTIONS TO CHARGE OF COURT TO THE JURY.—The Court can protect itself from a hasty perusal and adoption of written instructions to a jury asked by counsel, by a rule that they shall be submitted to counsel on the other side, and be settled by the Court before argument, and therefore an exception in form to each of such instructions, is sufficient; but exceptions to an oral charge ought to point out the specific portions excepted to, and be made at the time.

EXCESSIVE DAMAGES.—A verdict of ten thousand dollars for an injury by a railroad car which necessitates the amputation of an arm, where the defendant was guilty of gross negligence, is not a case of excessive damages.

COMPLAINT IN ACTION FOR PERSONAL INJURY.—In an action for damages for a personal injury sustained by the plaintiff from a railroad car, it is not necessary to aver in the complaint that the plaintiff sustained the injury without any fault on his part.

CONTRIBUTORY NEGLIGENCE A MATTER OF DEFENSE.—In an action for damages for a personal injury, negligence on the part of the plaintiff is a matter of defense, to be proved affirmatively by the defendant, unless it can be inferred from circumstances proved by the plaintiff.

APPEAL from the District Court, Fifth Judicial District, County of San Joaquin.

This action was brought to recover damages sustained

Statement of Facts.

by the plaintiff, Hannah, by the loss of an arm, as stated in the opinion. In the complaint, the damages were laid at twenty thousand dollars. There was no evidence of the expense of plaintiff's illness, or as to the amount of time lost by her, or its value to her, or as to her capacity to earn money. The evidence showed that she was engaged in washing.

The Court, at the request of the plaintiff, gave the following instructions to the jury:

"If the jury believe from the evidence that plaintiff, Hannah Robinson, sustained the injuries complained of in the complaint, through the carelessness or negligence on the part of defendant, and without negligence or carelessness on her part, then the jury should find for the plaintiff, and assess the damages in such sum as the jury, under the circumstances of this case in evidence, believe the plaintiff ought to recover, not exceeding \$20,000.

"The plaintiff, Hannah Robinson, had a right to cross Sacramento street, at the ordinary and usual crossing of such street; and if the jury believe from the evidence that while she was crossing such street at the usual and ordinary crossing, and while so crossing, the defendant moved its train, without giving notice thereof so as to enable the plaintiff, Hannah Robinson, with reasonable care, to escape from injury by reason of the moving of such train; and if the jury further believe from the evidence that by reason of the moving of said train, and without giving reasonable notice to said Hannah Robinson thereof, she sustained the injuries in complaint mentioned; then plaintiff has a right to recover from defendant, and the jury should find for plaintiff.

"A railroad company is bound to use ordinary care and caution, to avoid injuring persons or property which may be upon its track.

"The managers of a railroad must take that degree of care which the majority of prudent and careful men would take, in the same situation, to avoid the same risks to their own persons, and to take such precautions against danger as the magnitude of the peril demands; and in this case, if you find

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from the evidence that the defendant, the Railroad Company, did not exercise such degree of care, and that by reason thereof the plaintiff lost her arm, as charged in the complaint, and that she did not contribute to such accident, then the plaintiff is entitled to recover such damage as you may find from the evidence she has sustained, not exceeding twenty thousand dollars."

The COURT, of its own motion, gave the following oral charge to the jury:

"Gentlemen, in this case you have heard counsel in their argument speak to you about feeling and prejudice. This is a case, gentlemen, where a jury is required to look calmly and reasonably at the facts that have been presented in evidence. If you have any prejudice for or against the plaintiff or defendant in this case, any feeling or any passion, this is not the time or place for it to make any impression on you or influence your conduct at all. You are the judges of the truth of the evidence given by all the parties here; and if you believe that the party plaintiff has sustained damages under the circumstances here presented to you in the instructions, you will find for the plaintiff. If, on the contrary, under the law and under the evidence, she is not entitled to recover anything, then you will find for the defendant; and in writing your verdict, if you find for the plaintiff, you will say, we, the jury find **for the plaintiff; and assess damages at what you think right.** If you find for the defendant, you will simply say, we, the jury, find for the defendant."

Counsel for defendant asked the Court to give the jury the following instructions, which were refused:

No. 3. "The question presented to the jury is not one of comparative negligence as between the parties, and it matters not whether those in charge of the defendant's cars were more or less negligent, if the plaintiff, Hannah, by her own negligence, exposed herself, or was exposed by her own neglect or carelessness, to the accident which happened."

No. 4. "If the jury believe that the accident to the plaintiff, Hannah, was caused by the joint concurrent negligence of the plaintiff, Hannah, and those in charge of

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the cars of the defendant, then the plaintiff cannot recover. It is immaterial on which side the preponderance of blame lies; if both were at fault at the time of the injury, the plaintiff cannot sustain the action, and the jury must find for the defendant."

No. 15. "Even if the persons in charge of defendant's train neglected to ring the bell, or to give any signal before starting it, still, if the plaintiff, Hannah Robinson, might have avoided the accident by the exercise of ordinary care, and her own carelessness directly contributed in producing the injury complained of, the plaintiff cannot recover."

The other facts are stated in the opinion.

S. W. Sanderson, for the Appellant.

It is the settled law of this Court, that in cases of this character, the *gravamen* of the action is the negligence of the defendant, and hence that the plaintiff cannot recover, where his own negligence has contributed directly in any degree, to the injury sustained. (*Richmond v. Sacramento Valley Railroad Co.* 18 Cal. 351; *Gay v. Winter*, 34 Cal. 153; *Kline v. C. P. R. R. Co.* 37 Cal. 400; *Needham v. San Francisco and San Jose Railroad Co.* 37 Cal. 409; *Moore v. The Central Railroad*, 4 Zab. 268; *Runyon v. The Central Railroad Co.* 1 Dutcher, 556.)

The burden of proof always rests upon the plaintiff, and it is not enough for him to prove that he has sustained an injury by the act or omission of the defendant. He must show in addition, that the defendant, in such act or omission, violated a duty resting upon him. (*Robinson v. Fitchburg, etc. R. R. Co.*, 7 Gray, 92; *McCully v. Clarke*, 40 Penn. St. 399.)

Nor is it enough for him to show that he has sustained an injury through the violation of some duty resting upon the defendant. He must show, in addition, that he himself exercised ordinary care and caution; for if he could have avoided the injury, notwithstanding the neglect of the defendant, he cannot recover. (*Parker v. Adams*, 12 Met-

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calf, 415; *Tisdale v. Inhabitants of Norton*, 8 Id. 388; *Kennard v. Burton*, 25 Maine, 39; *Runyon v. The Central Railroad Co.*, *supra*.)

But it is conceded that if the plaintiff did not exercise ordinary care, and yet did not by the want of it contribute to produce the injury, he will be entitled to recover. (*Butterfield v. Forrester*, 11 East. 60; *Kennard v. Burton*, 25 Maine, 39.) The same qualification, however, applies to the liability of the defendant. Although he may have been negligent, or omitted some act which it was his duty to perform, yet if such omission did not contribute to the injury of the plaintiff, he is not liable. Hence it has been held that a traveler approaching a railroad track is required to use his eyes and ears, if he would avoid the imputation of negligence, even though the railroad company may neglect the proper signals. (*Ernst v. Hudson River R. R. Co.*, 39 N. Y. 61.) Also, that the negligence of the company in not ringing the bell, or sounding the whistle, does not excuse the plaintiff from the exercise of ordinary care and prudence in attempting to cross the track of the road. (*Wilcox v. Rome, Watertown and Og. R. R. Co.*, 31 N. Y. 358.) And that one who is approaching a railway crossing is not absolved from the duty of looking up and down the track to see whether a train is approaching, by the omission to ring the bell or blow the whistle; and if failure to take such precautions contributes to any injury received by him by a collision with trains running on said railroad, he cannot recover for such injury. (*Havens v. The Erie Railway Co.*, 41 N. Y. 296.)

So in Massachusetts, where by statute the drivers of sleighs are required to use bells on their harness, it was held that the plaintiff could not recover, it appearing that the omission of the defendant to use bells did not contribute to the injury complained of. (*Kidder v. Inhabitants of Dunstable*, 11 Gray, 342.) It was considered that the defendant was liable for the penalty imposed by the statute, but not for the injury to the plaintiff, if the omission to comply with the statute did not contribute to produce it.

Such is the rule of the statute of this State, which re-

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quires railroad corporations to keep a bell on their engines, and to ring it on certain occasions. For a neglect of the duty imposed, the statute provides a penalty of one hundred dollars, and that "said corporation shall also be liable for all damage which shall be sustained by any person, by reason of such neglect." (Section forty-one of the statute in relation to railroad corporations.) This necessarily implies that the corporation is not liable for damages where the not ringing of the bell has not contributed to produce the injury. The evidence of contributory negligence is stronger than in either of the following cases, in each of which a judgment against the defendant was reversed. (*The Toledo and Wabash Railway Company v. Goddard*, 25 Ind. 185; *Wilcox v. Rome, Watertown and Ogdensburg R. R. Co.*, 39 N. Y. 358; *Havens v. Erie Railway Co.*, 41 N. Y. 296.)

There having been no special damage proved, there was no basis for the jury to act on, except what the Court gave them, their own sense of right. The verdict was therefore obviously the result of passion or prejudice. Upon this point I take the following report of an English case, from Van Nostrand's Engineering Magazine for June, 1870, at page 617:

"At the Liverpool Assizes, on Saturday, a piano dealer and tuner of pianos said to be earning three hundred pounds (£300) per annum, claimed damages for such injuries received in an excursion train on the London and North Western Railway, as incapacitated him for the pursuit of his calling. Mr. Justice BRETT, in addressing the jury, said that if sufferers from railway accidents got annuities equal to their prospective earnings, it would be impossible for the companies to carry on their business. Both parties, he held, should share the consequences of an ordinary liability to accident, and bearing this fact in mind, as well as the fact that railway companies were compelled to carry passengers, the jury should assess damages accordingly. The award of the jury was six hundred pounds (£600)."

Thus the jury allowed him his prospective earnings for

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two years. In the present case the jury have allowed the plaintiff a sum equal to her prospective earnings for more than twenty years.

In actions for injuries to persons or property it must appear from the complaint, either by direct averment or the nature of the case stated, that the plaintiff was not in fault. In support of the negative of this proposition, counsel upon the other side have cited a number of cases, all of which, with a single exception, are not in point. (*May v. Hanson*, 5 Cal. 360; *Finn v. Vallejo Street Wharf*, 7 Cal. 253; *Richmond v. S. V. R. Co.* 18 Cal. 351; *Gay v. Winter*, 34 Cal. 153; *Needham v. S. F. & S. J. R. Co.* 37 Cal. 409, and *Johnson v. The Hudson R. R. Co.* 20 N. Y. 73.) All these deals with the question of evidence, and do not touch at all upon the question of pleading. So far as the first two hold that the burthen of proof as to the negligence of the plaintiff, if any, is upon the defendant, they have been overruled in the other and later cases cited. *Smith v. Eastern R. R. Co.* 35 N. H. 356, and *Taylor v. Day*, 16 Vt. 566, merely hold that a complaint which does not contain an averment that the plaintiff was without fault, is good after verdict, a doctrine which is not only wholly inapplicable to our own system of practice, but in direct opposition to it. Under our practice, the objection that the complaint does not state a cause of action may be taken at any stage of the action — after verdict as well as before — from which it necessarily results that there is no cure for a bad complaint, except amendment. In *Gough v. Bryan*, 2 Mees. & Welsb. 770, and *Bridge v. Grand Junction R. R. Co.* 3 Id. 244, no point was made as to the sufficiency of the declaration. The defendants pleaded the negligence of the plaintiffs, and the plaintiffs demurred to the pleas, and the pleas were held bad.

The decision in *Wolfe v. Supervisors of Richmond*, 11 Abb. Pr. R. 270 — the only case cited by counsel which deals directly with the question of pleading — is entitled to no more weight as authority than would be the decision of a Judge of the District Court of this State. As an argument the opinion is worthless, for it contains no satisfac-

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tory discussion of the question. The great weight of authority is in favor of the doctrine that the burthen of proof is on the plaintiff to show himself blameless, and I understand such to be the settled doctrine of this Court. (*Gay v. Winter*, 34 Cal. 153; *Needham v. S. F. & S. J. R. Co.*, 37 Id. 422; *Kline v. C. P. R. Co.*, 37 Id. 406.) The same doctrine prevails in Indiana, and in that State its natural sequence—that the plaintiff was not in fault must be averred—has been repeatedly declared. (*The Michigan Southern and Northern Indiana R. R. Co. v. Lantz*, 29 Ind. 528; *The Evansville and Crawfordsville R. R. Co. v. Dexter*, 24 Id. 511; *The Indianapolis, Pittsburgh and Cleveland R. R. Co. v. Keely's Adm's*, 23 Id. 133; *The Evansville and Crawfordsville R. R. Co. v. Hiatt*, 17 Id. 102; *The Wayne, etc., Turnpike Co. v. Berry*, 5 Id. 286; *The President, etc., v. Dusouchett*, 2 Id. 286; *The Jeffersonville R. R. Co. v. Hendrick's Adm's*, 26 Id. 228; *The Toledo W. & W. R. Co. v. Bevin*, 26 Id. 443.) The same rule prevails in Illinois. (*The Chicago, B. & Q. R. Co. v. Hazzard*, 26 Ill. 373-6; *Galena & C. U. R. R. Co. v. Fay*, 16 Id. 558.)

Dudley, Budd & Scaniker, for the Respondent.

If the plaintiff is guilty of negligence in going upon a railroad track, yet the company are bound to exercise reasonable care and diligence in the use of their road; and if for want of that care the plaintiff is injured, the company is liable. (*Richmond v. Sacramento R. R. Co.* 18 Cal. 351; *Needham v. S. F. & S. J. R. R. Co.* 37 Cal. 409.) It is not every case of negligence of the plaintiff which will preclude him for recovering for an injury occasioned by the negligence of the defendant. (*Brown v. N. Y. C. R. R. Co.* 31 Barb. 385.) Neither do we agree to the proposition that in such cases the burden of proof is always upon the plaintiff—that is, that the plaintiff must show affirmatively that his own conduct on the occasion of the injury was cautious and prudent. This may be inferred from the circumstances in connection with the ordinary habits, conduct and motives of men; and the character of the defendant's negligence may be such as *prima facie* to prove the whole issue;

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and also the known disposition of men heedlessly to subject themselves to difficulty, is to be taken into consideration in determining the question. (*Johnson v. The Hudson R. R. Co.* 20 N. Y. 65; *Shearman and Redfield on Negligence*, Secs. 43-44.) But we can admit, for the sake of the argument, and without prejudice to respondent's theory of this case the rule of law, on that point, to be as stated by appellant's counsel. The plaintiff's evidence brought her entirely within the rule, and she gave positive, direct and affirmative proof touching her own conduct as well as that of the servants of the corporation on the occasion of the accident.

It was the duty of the engineer, or persons in charge of the locomotive, to look out at the crossing to see if there was any danger of a collision with any one about to cross the track. (*Wilds v. The Hudson River Railroad Co.* 33 Barb. 503.) We are aware that it is comparatively easy for counsel to point out now, by the light of after events, and sitting in tranquil safety, what would have been wise for the plaintiff to have done then; but most persons under such circumstances of instant, threatening peril, act rather from instinct than cool judgment and calm reasoning. It would be a hard rule indeed if the law demanded any such impossibility as judicious and wise conduct under such circumstances; and if, as we claim, the defendant's negligence had placed her in this imminent peril, then the defendant is answerable for the consequences, though the plaintiff did not exercise the soundest discretion in her efforts to escape. (*Eldridge v. Long Island R. R. Co.* 1 Sand. S. C. R. 89; 13 Peters, 181; *Collins v. Albany & S. R. R. Co.* 12 Barb. 492.)

Instruction number four, which was given at plaintiff's request, states the rule of law correctly, and as laid down by this Court, in *Needham v. S. F. & S. J. R. R. Co.* (37 Cal. 409; *Shearman and Redfield on Negligence*, Sec. 28.) The instruction was applicable to the case because it was clearly proved at the trial that the persons in charge of the locomotive kept no lookout at the street crossing, as they were required to do. Had they exercised reasonable care and diligence in that respect alone, they could have

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avoided the accident. For want of such reasonable diligence on the part of the company, the plaintiff was put in imminent peril, and was not in fault in attempting to cross the track; hence her right to recover is not affected, even if she did contribute to her injury. Under such circumstances the instruction was proper, and could not have misled the jury.

The measure of damages in such actions is somewhat vague and uncertain, hence it is that the Court in the case of *Coleman v. Southwick* (9 John. N. Y. 44,) declared that the damages must be so excessive as to strike mankind, at first blush, as being beyond all measure unreasonable, and such as manifestly show the jury to have been actuated by passion and prejudice. In short, the damages must be flagrantly outrageous and extravagant, or the Court cannot undertake to draw the line, for they have no standard by which to ascertain the excess.

In an action to recover damages for injuries to person or property, it is not necessary to aver in the complaint that the acts complained of did not occur through the negligence or carelessness of the plaintiff. In support of this point we refer the Court to the following authorities: *May v. Hanson*, 5 Cal. 560; *Finn v. Vallejo Street Wharf*, 7 Cal. 253; *Richmond v. S. V. R. R. Co.* 18 Cal. 351; *Gay v. Winter*, 34 Cal. 153; *Needham v. S. F. & S. J. R. R. Co.* 37 Cal. 409; *Johnson v. The Hudson R. R. Co.* 20 N. Y. 73; *Smith v. Eastern R. R. Co.* 35 N. H. 356; *Gough v. Bryan*, 2 Mees. & Walsh, 770; *Bridge v. Grand Junct. R. R. Co.* 3 Mees. & Walsh, 244; *Taylor v. Day*, 16 Vt. 566; *Wolf v. Supervisors of Richmond*, 11 Abb. Pr. 270.

In the cases cited in the fifth and seventh Cal. Rep. this Court held that "it is not incumbent on the plaintiff to prove the exercise, by him, of ordinary care to avoid the injury, but the want of it upon the part of the plaintiff lies on the defendant; that he who avers a fact in excuse for his own misfeasance must prove it." See also *Beatty v. Gilmore* (16 Penn. 463).

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versely the whole of Lafayette street with the exception of the limited space between the last car and the trestle-work. If before or after the plaintiff had commenced to cross she had been notified that the train was about to move, and a proper pause had been made, she would have escaped all injury. But she was not bound to wait indefinitely because the train was there, or to assume that it might move suddenly backward and without notice. If the bell was rung, this does not of itself establish proper care by the defendant, or a want of such care in the plaintiff. She may not have heard the bell at the other end of the train, or, hearing it, may not have accepted its sound as a signal that the cars were about to move in a direction the reverse of that ordinarily pursued. If there are persons in front of a locomotive about to start, the bell warns them to leave the track; but if they do not leave it, the engineer is not justified in driving his engine over them. The bell is intended to give notice to all, but it is the duty of the engineer to see that all have acted on the notice. Shall he run his train backward and be excused because he did not, or could not, see those in his way? Can a railroad company be relieved of any portion of its responsibility by adopting a mode of running its trains less cautious than the usual mode? A man should have been stationed where he could see the rails in the direction in which the train was to move, upon whose signal, that the line was clear, the engineer should have acted. The omission to provide such look out when a train was moved backward, and across a street of a populous city, is a circumstance of much weight in determining not only the fault of the defendant, but the question of the plaintiff's negligence. It is no defense to an action of this kind that the plaintiff by his own act has contributed to his injury; it must appear that by his own fault he has so contributed. And the law regards the plaintiff as innocent, unless he has been guilty of what has been called (somewhat awkwardly) "ordinary negligence;" that is, unless the evidence shows a want of ordinary care and prudence on his part. His failure to take great care is no defense. (Shearman and Redfield, Sec. 29.) The *for-*

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mula is, not that any degree of negligence on the part of the plaintiff which directly concurs in producing the injury (however slight) will constitute a defense; but if the negligence of the plaintiff, which amounts to the absence of ordinary care, shall contribute, in any degree, proximately to the injury, the plaintiff shall not recover. A very timid or cautious person would not perhaps have gone on the track as the plaintiff did, and—as the absence of great care is slight negligence—it may be claimed that, to that extent, the plaintiff was negligent. Yet if the person who should have been where he could see her had set the train in motion, the defendant would have been liable in damages. And this for two reasons: First, her negligence did not amount to the absence of ordinary care; and second, the gross negligence of defendant's servant in putting the cars in motion, with knowledge of her exposed position, would have been the sole proximate cause of the injury. As the case stands there is no proof that the agents of defendant were aware of the plaintiff's presence on the track—of that principally consists their culpable negligence since they should have been aware of it—but, unless we can declare that a foot-passenger was debarred the use of that portion of the street while a train of cars remained stationary near by, we must conclude that the plaintiff was justified in believing that she could safely cross the track when and where she made the attempt. A new trial should not be granted therefore on the ground that the negligence of the plaintiff contributed to the hurt she sustained.

But not only do we think that the jury were justified in finding that a want of ordinary care on the part of plaintiff did not proximately concur, with the negligence of defendant, in producing the accident, but we are satisfied that the jury could properly have come to no other conclusion on the subject. So convincing are the proofs that if the jury had found to the contrary it would have been the duty of the District Court to set aside the verdict as not supported by the evidence. Where there is no substantial conflict, and the finding is contrary to the evidence, a new trial should be granted. (*Lyle v. Rollins*, 25 Cal. 437.)

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At the request of the plaintiff, the Court charged the jury:

“In this case, if you find from the evidence that the plaintiff was guilty of negligence in going on the track of defendant, still the railroad company was bound on their part to the exercise of reasonable care and diligence in the use of their road, and the management of the engine and train; and if you find from the evidence that such reasonable care and diligence was not exercised by said company, their agents or servants, in the management of the engine and train at the time of the alleged accident, and by reason thereof the plaintiff was injured and lost her arm, as stated and charged in the complaint, then she is entitled to recover such damages as you find from the evidence she has sustained, not exceeding \$20,000.”

The plaintiffs were not warranted in asking this instruction. It was calculated by its terms to impress the jury with the idea, that even if the neglect of ordinary care, by plaintiff, concurred as a proximate cause, in precipitating the catastrophe, still the defendant was responsible, if its agents were at fault. *Needham v. San Francisco and San Jose Railroad Company* does not sustain the proposition broadly stated in the instruction; that was a case in which the plaintiff's negligence was remote, not proximate. But the charge could not have prejudiced the defendant. If the Court had instructed the jury that the plaintiff was not at fault, or was entitled to a verdict provided only the defendant was guilty of negligence, etc., this would not have been ground for setting aside the verdict, because the jury must, from the evidence, have found the fact assumed by the Court; that is, that the plaintiff was shown not to have been guilty of negligence. That question has been settled by this Court. (*Terry v. Sickles*, 13 Cal. 427; *Pico v. Stevens*, 18 Cal. 376.) In the present case the jury were told that they could disregard the legal consequences of a fact (plaintiff's negligence), if they found the fact to exist. This was error; but as the jury could only have found that the fact did not exist, the erroneous portions of the charge did not injure the defendant.

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The erroneous instruction fell with the fact on the hypothetical existence of which it rested, and the defendant can no more complain of the instruction than if the Court had directly charged that the fact did not exist; the evidence being so conclusive of its non-existence as that a new trial would be granted if the jury should find to the contrary.

If we are correct in what we have said, in respect to the effect of the evidence, the Court below committed no error in refusing the third, fourth and fifteenth instructions requested by the defendant. The fourteenth was properly refused, because it does not declare the law.

The Court gave to the jury a number of written instructions prepared by the respective counsel, and then charged them orally. The transcript reads: "Counsel on both sides excepted to the charges given and refused."

With respect to written instructions prepared by counsel the Court can protect itself from the consequences of a hasty perusal and adoption of them, by rule providing that they shall be submitted to counsel on the other side, and be presented for approval and settled before the argument begins. An exception to each of such instructions is sufficient in form. But it frequently happens that the instructions offered do not cover all the issues in the case, or that, as the argument proceeds, new points are made as to which, either because important or calculated to mislead, the Court deems it its duty to charge the jury. It is the common practice, therefore, (after the written charges are read,) for the Court to proceed of its own motion, with an oral charge. Exceptions to the oral charge ought to point out the specific portions excepted to, and be made at the time, in order that the Judge may have an opportunity, before the jury retires, to correct any error he may have inadvertently fallen into in the hurry and perplexities of the trial. (*Hicks v. Coleman*, 25 Cal. 122.) The party desiring to except could not complain of surprise while the Practice Act of 1851 was in operation, because, by the one hundred and fifty-sixth section of that Act, he could have the points of law contained in the charge reduced to writing before the jury retired.

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In the case before us, if the exception applies to the oral charge at all, it applies to it generally, and does not point to the specific portion objected to; nor did the defendant call the attention of the Court to its error, if any, in respect to the matter of damages, by presenting any specific instruction with respect to the same subject.

In view of all the evidence, we cannot say that the damages found by the jury are excessive.

Judgment and order denying the motion for a new trial affirmed.

The defendant filed a petition for a rehearing, and the following opinion was delivered, denying the application.

By the COURT:

The point presented in the petition for rehearing is that there is no averment in the complaint that the plaintiff sustained the injury in question without any fault on her part.

It would seem that this omission has been held to render the pleading defective in Indiana, Illinois and Maine. (*Michigan, etc., R. R. Co. v. N. Y. R. Co.* 29 Ind. 528; *The Chicago, etc. R. R. Co. v. Hazard*, 26 Ill. 373; *Buzzell v. Laconia Man. Co.* 48 Maine, 113.)

We think the proposition that negligence on the part of the plaintiff is a matter of defense, to be proved affirmatively by the defendant, unless it can be inferred from circumstances proved by the plaintiff, is sustained by the better reason. (*Shearman and Redfield on Negligence*, Secs. 43, 44; *Penn. Canal Co. v. Bentley*, 66 Penn. St. 30; *Smoot v. Wetumpka*, 24 Ala. N. S. 112; *Johnson v. Hudson River R. R. Co.* 5 Duer, 21.)

In this class of cases the complaint need not allege that the injury was done without fault of the plaintiff. The petition for rehearing is denied.

Argument for Appellant.

[No. 3,411.]

**THE PEOPLE v. J. S. CONE AND THE REAL ESTATE
ASSESSED.**

ASSESSMENT OF LAND FOR TAXES.—An assessment of a large tract of land for taxes, under the Act of 1861, which describes the whole tract by metes and bounds, and then excepts from the tract parcels of the same which had previously been conveyed, but does not describe the excepted portions by metes and bounds, nor in any manner, except by a reference to recorded deeds, is void on its face.

COMPLAINT IN ACTION FOR TAX.—The fortieth section of the Revenue Act of 1861, which provides that a complaint, in an action to recover a tax, need not follow the description of the property as found in the assessment, only permits a different description of the property in the complaint from that contained in the assessment, but does not obviate the necessity of showing on the trial a valid assessment of the same land described in the complaint.

APPEAL from the District Court, Second Judicial District, County of Tehama.

Action to recover the sum of one thousand six hundred and eighty-nine dollars and eighty-seven cents, for the tax of the year 1870. The District Attorney, in the complaint, first described the whole tract of land by metes and bounds, and then gave a particular description by metes and bounds of each excepted parcel, as given in the deeds conveying the same, referring to the page of the record of each deed. On the trial he produced in evidence the assessment mentioned in the opinion. The defendant objected to the assessment being received in evidence; the Court overruled the objection, and the defendant excepted. The plaintiff obtained judgment and the defendant appealed.

Charles P. Braynard and *Creed Haymond*, for the Appellant.

Assessments must be made in strict conformity with the statute. The strictest obedience is required to every statutory direction in the mode of assessing, the manner of making the assessment roll, the form thereof, etc. If there

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is any deviation from the direction of the statute, the assessment is wholly void. (*People v. Sneath & Arnold*, 28 Cal. 615; *Moss v. Shear*, 25 Cal. 46; *Kelsey v. Abbott*, 13 Cal. 619; *Smith v. Davis*, 30 Cal. 536; *Blatner v. Davis*, 32 Cal. 331; *Blackwell on Tax Titles* 84, *et seq.*; *Id.* 738; *Id.* 140-150.)

The assessment was insufficient, and was not in conformity with the statute. Section twenty of the Revenue Law (Hittel 2, p. 6169), requires that land shall be described by metes and bounds, and that the township, where situated, shall be given. (*Lachman et al. v. Clark*, 14 Cal. 181; *Kelsey v. Abbott*, 13 Cal. 609; *High v. Shoemaker*, 22 Cal. 371, *et seq.*; *People v. Pearis*, 37 Cal. 261.)

The description pretends to give certain metes and bounds. The whole tract of land comprised within these metes and bounds is assessed, "excepting therefrom that portion of about eight thousand acres, sold by Job Dye to F. W. Fratt and T. R. King," etc. This form of assessment has been many times held by this Court as void. The complaint even would have been fatally defective if it described the land assessed by giving its metes and bounds, etc., less certain lots sold out of the same, without giving the location and boundaries of the lots sold. The assessment roll does not give the boundaries of the lots sold out of the entire tract, and is therefore void. (*People v. Mariposa Company*, 31 Cal. 196; *People v. Pico*, 20 Cal. 595; *People v. Holliday*, 25 Cal. 304.)

P. B. Nagle, District Attorney of Tehama County, for the Respondent.

The complaint describes the property as being situate in Antelope Township, County and State aforesaid, etc. Section forty (par. 6189) of the Revenue Laws, under which this action is brought (see 2d Hittell's Gen. Laws), authorizes the District Attorney to make a correct description of the land than can be found in the assessment-roll. The land is sufficiently described in the complaint. Counsel for appellant refer to paragraph six thousand one hun-

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dred and sixty-nine (Sec. 20, 2d Hittell's General Laws), and say the land should be described by metes and bounds.

The second subdivision of that section reads as follows, viz.: "All real estate and improvements taxable * * * *
* * * described by metes and bounds, or by common designation, or name," has been strictly complied within the complaint, and is as follows: "Said ranch herein assessed is variously known as the 'Dye Ranch,' 'Antelope Ranch,' 'Rancho el Premier Canon.'"

By the Court, CROCKETT, J.:

The assessment sought to be enforced in this action is void on its face. It describes by metes and bounds a large tract of land as that which is assessed; but excepts from the assessments several parcels of the larger tract which had been previously conveyed, and the excepted portions are not described by metes and bounds, nor in any manner, except by a reference to the recorded deeds. It is impossible to ascertain from the assessment, on its face, what particular lands were intended to be assessed and what excepted. In order to determine with any reasonable certainty the particular tract assessed, it would be necessary to make a laborious search of the records, and possibly to invoke the aid of a surveyor. The deeds referred to in the assessment might prove, on examination, to be so vague in the descriptive calls, as to leave it doubtful what lands they included. The assessment was made under the Revenue Act of May 17, 1861, the twentieth section of which requires that real estate situate without the limits of a city or incorporated town shall be described on the assessment-roll "by metes and bounds, or by common designation or name; * * * giving the number of acres as nearly as can be conveniently ascertained, and the location and township where situate." This assessment does not attempt to describe the land "by common designation or name;" and for the reasons already stated, it does not describe it by metes and bounds. If it be sufficient to describe the excepted portions only by reference to recorded deeds, it would be

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equally competent to describe the tract assessed in the same manner; and no one, I apprehend, would claim that an assessment which described the land not otherwise than by reference to a deed of conveyance, would be valid. On the contrary, the statute requires that the description, either by common designation, or name, or by metes and bounds, shall appear on the face of the assessment-roll; so that by inspecting it, the owner and all other persons may know what particular land is assessed. This assessment is void for a failure to comply with the statute in this respect. (*People v. Pico*, 20 Cal. 595; *People v. Mariposa Co.*, 31 Id. 196.)

The District Attorney suggests that if this method of assessing large ranches, numerous parcels of which have been sold and conveyed, is not valid, it will be impossible to assess them at all. But we do not so regard it. It may impose additional labor on the Assessor; but it is certainly not impracticable to describe the whole ranch by common designation, or name, or by metes and bounds, and then except out of it the several parcels conveyed by recorded deeds, giving the metes and bounds of each parcel, as found in the deed. But if it be convenient, or even impracticable, under existing statutes, to assess lands so situated, the remedy must be sought from the Legislature.

The fatal defect in this assessment was not and could not be cured by a better description in the complaint. Section forty of the Act provides that in the complaint "it shall not be necessary to follow the description of the property as made in the assessment, and the description in the complaint shall be deemed sufficient if it can be ascertained therefrom what land and improvements, or either, is intended." The only effect of this provision is to authorize a different description in the complaint of the land assessed from that in the assessment. It is, however, none the less essential to produce a valid assessment of the same land described in the complaint. It may be differently described, but it must be the same land; and the description in the assessment must conform substantially to the statute. Otherwise the action cannot be maintained, however per-

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fect the description in the complaint. There can be no recovery without a valid assessment.

The assessment being void on its face, the Court below erred in holding it to be valid.

Judgment reversed and cause remanded, with an order to the Court below to dismiss the action. Remittitur forthwith.

[No. 2,746.]

THE PEOPLE v. ISAAC HYDE, E. F. NORTHAM, R. B. WOODWARD, J. S. CONE, THE ANTELOPE RANCH AND MILL COMPANY, AND THE REAL ESTATE DESCRIBED IN THE COMPLAINT.

COMPLAINT TO RECOVER TAX.—A complaint in an action to recover a tax, which alleges that a portion of the real estate assessed to the defendants belonged to other persons, does not state a cause of action.

ASSESSMENT FOR TAX.—An assessment for a tax, in which fifteen thousand and eighty acres of land are assessed by quantity and boundaries, excepting therefrom a portion thereof before sold, without a description of the excepted portion, is void.

APPEAL from the District Court, Second Judicial District, Tehama County.

Action to recover a tax.

The following is the description contained in the assessment, of the land assessed:

“Fifteen thousand one hundred and eighty acres of land, commencing at Sacramento river at the mouth of Antelope Creek; thence following the middle of said river six hundred and thirty-two and forty-nine one-hundredths chains distant in a straight line from point; thence north forty-eight and a half east, four hundred and ninety-six chains; thence south forty-eight and a half east, six hundred and thirty-two and four one-hundredths chains; thence south forty-eight and a half west, four hundred and two chains to place of beginning; excepting the portion of said rancho hereinbefore conveyed by Job F. Dye to Copeland; and also nine

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hundred conveyed by the company to Sanborn and H. C. Copeland — being nine hundred acres.”

The complaint described the whole tract, and then contained a description of the several parcels averred to be excepted from the general tract. First, about eight thousand acres sold by Job F. Dye to F. W. Fratt and T. R. King. Second, one hundred and sixty acres sold to D. W. Crumley. Third, about five hundred and seventy-four acres sold by said Dye to H. C. Copeland. Fourth, one hundred and sixty acres sold to W. H. Bahney. The complaint excepted three additional tracts by description, without stating that they had been sold.

The plaintiff recovered judgment for three thousand four hundred and seventy-eight dollars and forty-four cents, and the defendants appealed from the judgment, and from an order denying a new trial.

Charles P. Braynard and Creed Haymond, for the Appellants.

Assessments must be made in strict conformity with the statute. The strictest obedience is required to every statutory direction in the mode of assessing, the manner of making the assessment roll, the form thereof, etc. If there is any deviation from the direction of the statute, the assessment is wholly void. (*People v. Sneath & Arnold*, 28 Cal. 615; *Moss v. Shear*, 25 Cal. 46; *Kelsey v. Abbott*, 13 Cal. 619; *Smith v. Davis*, 30 Cal. 536; *Blatner v. Davis*, 32 Cal. 331; *Blackwell on Tax Titles*, 84 *et seq.*; *Id.* 738; *Id.* 140-150.) The description pretends to give certain metes and bounds. The whole tract of land comprised within these metes and bounds is assessed, “excepting the portion of said rancho hereinbefore conveyed by Job E. Dye to Copeland, and also nine hundred conveyed by the company to Sanborne and H. C. Copeland, being nine hundred acres.”

This form of assessment has been many times held by this Court as void. The assessment roll does not pretend even to give the boundaries of the lots sold out of the entire tract, and is, therefore, certainly void. (*People v. Mariposa Company*, 31 Cal. 196; *People v. Pico*, 20 Cal. 595; *People v. Holliday*, 25 Cal. 304.)

Points decided.

P. B. Nagle, District Attorney for Tehama County, for the Respondent.

The real estate is correctly described by exterior boundaries, and, if defective as to the several portions sold, that defect is supplied by the complaint. The District Attorney is authorized by 2 Hittell (Sec. 40, par. 6169), to describe the property correctly, though insufficiently described in the assessment.

By the Court, *McKINSTY, J.*:

Even though it be assumed that the description contained in the assessment is sufficient, the complaint alleges that a large portion of the lands assessed to the defendants belonged, in fact, to other persons. But the attempted assessment is void. (*People v. Cone*, ante p. 427.)

Judgment and order reversed.

[No. 3,937.]

E. J. BALDWIN v. FRANCIS BORNHEIMER AND CATHERINE BORNHEIMER, HIS WIFE, WILLIAM THOMPSON AND E. A. LAWRENCE.

ACKNOWLEDGMENT OF THE DEED.—The presumption is that the certificate of the notary, of the acknowledgment of a deed, states the facts.

AN ERROR WHICH DOES NO HARM.—A judgment will not be disturbed on account of error in the admission of testimony, if the testimony admitted does no harm.

AMENDMENT TO COMPLAINT.—If an attorney enters an appearance in a case for a person who is not named in the complaint as a party defendant, after the defendant named in the complaint has answered, and by stipulation, the answer on file is considered as the answer of the party for whom the attorney thus appears, the complaint should be amended by inserting the name of such party, and if not amended before an appeal is taken, the Supreme Court will direct the Court below to allow the amendment, even if it affirms the judgment.

EVIDENCE IN EJECTMENT.—If, after the defendant in ejectment has answered, raising issues on the question of title, the attorney for the defendant appears for a person not made a defendant in the complaint,

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and, by stipulation, the answer is considered as the answer of the person for whom the attorney thus appears, the party who thus appears must connect himself by evidence with the title of the original defendant, before he can introduce evidence as to the issues.

INSTRUCTIONS REFUSED.—If the evidence does not appear in the transcript, the applicability of instructions asked and refused, cannot be considered on appeal.

EJECTMENT to recover a lot in San Francisco. The original defendants were Francis Bornheimer and Catherine Bornheimer, his wife, Wm. Thompson and E. A. Lawrence. One of the defenses relied on was, that one John Thomas had, in 1865, fraudulently procured the defendant Francis to give him a deed of the demanded premises, and that Thomas had afterwards died, and the lot had been sold at administrator's sale, and purchase by John J. Powers, who had sold it to the plaintiff, and that Powers and the plaintiff purchased with knowledge of the facts constituting the fraud. The plaintiff before the cause was submitted to the jury dismissed the action as to the other defendants, and recovered judgment against Wm. Thompson and Engel Bornheimer, and they appealed.

The other facts are stated in the opinion.

E. A. Lawrence, for the Appellants.

G. F. & W. H. Sharp, for the Respondent.

By the Court, **McKINSTRY, J.:**

Complaint in ejectment. After the usual denials, and a plea of the Statute of Limitations, the defendants, "for a further and separate answer, by way of cross-complaint," set up: That a deed of conveyance, through which the plaintiff deraigned his title, was obtained from the defendant F. Bornheimer by fraud, and that plaintiff had notice of the facts constituting the fraud, and prayed "that said title of said plaintiff be decreed to be null and void, and to be delivered up to be canceled, and that defendant have such other and further relief as shall be meet, etc."

On motion of defendant's counsel, the issues presented

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by defendant's answer herein, setting up an equitable defense, were (first) tried by the Court without a jury.

The Notary Public, who certified to the acknowledgment of the deed above mentioned, was examined as a witness. Having said that he had no distinct recollection of the particular transaction, he was permitted to state that it had been his uniform custom to ask of a party to an instrument, if he understood its contents, if the signature was his, and if he executed it freely and voluntarily.

There was no evidence which would have justified the Court below in finding that F. Bornheimer did not properly acknowledge the instrument; and the presumption is that the certificate of the Notary states the facts. Assuming the evidence to have been improperly admitted, the testimony of the Notary could not therefore have injured the defendants.

The evidence failed to establish the fraud alleged, and utterly failed to show that the grantee named in the deed was a party to such fraud, or that the plaintiff had notice of any fraud.

The Court below properly decreed the conveyance to be valid and effective. Subsequently the issues made by the averment of matters constituting a legal defense came on to be tried by a jury, duly empaneled.

Mr. Lawrence, of counsel, entered an appearance for Engel Bornheimer, and by stipulation, the answer on file was considered the answer of said Engel. Engel Bornheimer was not named originally in the complaint, and no application was made to amend, by inserting his name as a defendant.

Engel Bornheimer offered to introduce "the same evidence" which had been given on the part of F. Bornheimer, on the trial of the issues presented by the cross-complaint and equitable defense, but did not offer to prove that he was in any way connected with the claim of title of F. Bornheimer. The plaintiff's objection to the evidence offered was properly sustained. The evidence given to the jury does not appear in the transcript. The applicability of the instructions requested by defendants cannot, there-

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fore, be determined here. We think the complaint should be amended. (*McKinley v. Tuttle*, 42 Cal. 570.)

It is ordered that the District Court amend the complaint or cause the same to be amended, as of a date prior to the judgment in said Court, by the insertion therein of the name, Engel Bornheimer, as a party defendant.

Judgment and order denying new trial affirmed, the respondent to pay the costs of this appeal.

Mr. Justice NILES did not express an opinion.

[No. 10,100.]

THE PEOPLE v. BARTLETT FREEL.

DISTINCTION BETWEEN MURDER AND MANSLAUGHTER.—Whether a homicide amounts to murder or to manslaughter merely, does not depend upon the presence or absence of the intent to kill.

IDEM.—In either murder or manslaughter, there may be a present intention to kill at the moment of the commission of the act.

APPEAL from the District Court of the Third Judicial District, City and County of San Francisco.

The defendant was indicted for the crime of murder, alleged to have been committed at San Francisco, on the first day of November, 1873, by killing one Edward W. Allen. Allen kept a saloon, and a crowd of persons having collected there so as to obstruct his doorway, he went from his place behind the bar with a cane or stick to clear the passage-way. A difficulty took place, during which he was killed. The defendant claimed to have been justified, but the testimony was of such a character, that it became a question, if he was not justified, whether the offense was murder or manslaughter. The defendant was convicted of murder in the second degree, and appealed.

C. B. Darwin, for the Appellant, argued that if there was no intention to kill, there was no crime unless there was criminal negligence.

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Attorney-General Love, for the People.

By the Court, NILES, J.:

The Court instructed the jury as follows: "You will also observe that the difference between murder and manslaughter is, that in manslaughter there is no intention whatever either to kill or to do bodily harm. The killing is the unintentional result of a sudden heat of passion, or of an unlawful act committed without due caution or circumspection."

This is clearly erroneous. Whether the homicide amounts to murder or to manslaughter merely, does not depend upon the presence or absence of the intent to kill. In either case there may be a present intention to kill at the moment of the commission of the act. But when the mortal blow is struck in the heat of passion, excited by a quarrel, sudden, and of sufficient violence to amount to adequate provocation, the law, out of forbearance for the weakness of human nature, will disregard the actual intent and will reduce the offense to manslaughter. In such case, although the intent to kill exists, it is not that deliberate and malicious intent which is an essential element in the crime of murder.

Under the circumstances of this case, as shown by the testimony, it was important that the distinctions between the several grades of homicide should be correctly stated to the jury. They could hardly fail to be misled by the erroneous instruction we have noticed.

Several other points were made by the counsel for defendant, which we do not deem it necessary to discuss.

Judgment and order reversed, and cause remanded for a new trial.

Argument for Appellant.

[No. 3,791.]

R. G. SNEATH v. MARTIN GRIFFIN, R. A. McDONELL AND ALEX. MOORE.

WHEN PARTY MAY BE DECLARED BOUND BY A JUDGMENT.—If judgment is rendered against a party upon several promissory notes signed by him, and one of the notes is also signed by two other persons who are made parties defendant, but are not served with process and do not appear, such other persons may be brought into Court to show cause why they should not be bound by the judgment, to the extent of the note which they signed, and they may be declared bound by it.

APPEAL from the District Court, Fourteenth Judicial District, County of Placer.

On the sixth day of March, 1870, the plaintiff brought suit against the three defendants on three promissory notes, two signed by defendant Griffin alone, and one signed by the three defendants. Griffin had given a mortgage to secure the notes. Summons was served on Griffin alone, and defendants McDonell and Moore did not appear. Judgment by default was rendered against Griffin, and the Sheriff sold the mortgaged property, and reported a deficiency of one thousand two hundred and ninety-four dollars and ten cents, which was docketed by the Clerk. On the 16th of December, 1872, the plaintiff procured a summons which was served on the defendants McDonell and Moore, requiring them to appear and show cause why they should not be bound by the judgment to the extent of the note which they had signed. On the trial the only evidence introduced was the promissory notes, the judgment, the order of sale, Sheriff's report, and docket entry of the unsatisfied balance. The Court entered judgment in favor of defendants Moore and McDonell, and the plaintiff appealed.

Myres & Fellows, for the Appellant.

The other two notes cut no figure; the judgment against Griffin being for the sum of all the notes, is no less a judg-

Points decided.

ment against him for the sum of this particular note, signed by Moore and McDonell, and the case stands precisely as it would had there been no other note in it.

Hale & Craig, for the Respondent.

By the Court, MCKINSTREY, J.:

For the reasons stated in the brief of counsel for appellant, the judgment and order should be reversed, and the District Court should order and adjudge the defendants, McDonell and Moore, bound by the original judgment to the extent of six hundred and thirty-seven dollars thereof. So ordered.

Mr. Chief Justice WALLACE did not express an opinion.

[No. 3,633.]

CHRISTIAN F. A. DAMBMANN v. PATRICK J. WHITE AND HENRY BRESLAUER.

COMPLAINT BY ASSIGNEE IN BANKRUPTCY.—In proceedings in bankruptcy, the legal title to the property of the bankrupt vests in the assignee, and in an action brought by the assignee to recover the assets of the bankrupt, it is not necessary to aver in the complaint, the bankruptcy of the bankrupt, nor the appointment of the plaintiff as assignee; but it is sufficient to allege that the plaintiff owns the property. The facts by which the assignee acquired the property are not ultimate, but probative facts.

ACTION BY ASSIGNEE IN BANKRUPTCY.—In an action by an assignee in bankruptcy to recover the assets of the bankrupt, the plaintiff may prove the bankruptcy, and his appointment as assignee, under a general allegation in the complaint, that he owns the goods.

SUIT BY ASSIGNEE IN BANKRUPTCY AGAINST A STRANGER.—Although an assignee in bankruptcy holds the legal title to the property of the bankrupt when recovered, in trust for the purposes specified in the statute, still, as between him and a stranger, he holds the title, and may assert it in the same form of action as though he owned the fee.

PROOF IN ACTION BY ASSIGNEE IN BANKRUPTCY.—In an action by the assignee in bankruptcy against a stranger to recover the assets of the bankrupt, it is not necessary for the plaintiff to prove his appointment

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as assignee, nor all the steps taken in the proceedings in bankruptcy, but after proof of the adjudication in bankruptcy, a copy of the assignment is evidence of the assignee's title.

DEPOSITION OF A WITNESS OUT OF THE STATE.—In an application for a commission to take the deposition of a witness residing out of the State, it is sufficient to serve on the opposite party the copy of an order of the Court or Judge, requiring the party to show cause on a day named why a commission should not issue. No other notice is required. If the day named is less than the five days required for notice by the statute, the order and the issuing of the commission are equivalent to an order shortening the time.

IDEM.—The commission to take a deposition need not state on its face that the person to whom it issued was a Judge or a Justice of the Peace.

IDEM.—The presumption is, that on granting the commission, the Judge who ordered it performed his duty, and directed it to a person who was qualified to execute it.

ASSIGNEE IN BANKRUPTCY CAN SUE IN STATE COURT.—An assignee in bankruptcy can maintain an action in a State Court to recover personal property or damages therefor disposed of by the bankrupt in fraud of the bankrupt law.

APPEAL from the District Court, Fourth Judicial District City and County of San Francisco.

The complaint was as follows:

Christian F. A. Dambmann, plaintiff in this suit, assignee of the estate and effects of Oscar Reinstein and Simon Manlock, bankrupts under the statute of the United States, complains of Patrick J. White and Henry Breslauer, defendants, and alleges against them as follows:

Heretofore, to wit: On or about the thirty-first day of March, in the year eighteen hundred and sixty-nine, at the City and County of San Francisco, the plaintiff was possessed as of his own property, as such assignee aforesaid, of the following goods and chattels, to wit: One hundred Marseilles quilts, fifteen hundred pair of men's woolen half hose, forty coats, twenty vests, one thousand merino shirts, one thousand merino drawers, and four thousand yards of linen check, said goods and chattels then and there being of the value of three thousand dollars.

That on or about the day last aforesaid, at the City of San Francisco, aforesaid, the defendants unlawfully took and disposed of said goods and chattels above mentioned

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and described, which were then and there of the value of three thousand dollars.

That on the day and year last aforesaid, at the place aforesaid, the defendants unlawfully took and converted and disposed of said goods to their own use, to the damage of the said plaintiff, as such assignee as aforesaid, of three thousand dollars.

Wherefore the plaintiff, assignee as aforesaid, prays judgment for three thousand dollars and costs.

The defendants demurred to the complaint because it did not state facts sufficient to constitute a cause of action, but the demurrer was overruled. The defendants then answered, denying the allegations of the complaint. On the trial, the counsel for the plaintiff made the following opening statement:

That the property in question in this suit, consisting of five cases of clothes and dry goods, was shipped from New York to San Francisco on the 1st of October, 1868, by Reinstein & Mamlock, who were then the owners of said goods; that on the 21st day of October, 1868, certain proceedings in bankruptcy were taken against Reinstein & Mamlock in the United States District Court for the Southern District of New York; that under these proceedings Reinstein & Mamlock were declared bankrupts, and that on the 25th day of March, 1869, an assignment of their property was executed under the Bankrupt Law to the plaintiff in this suit. That on the 7th day of January, 1869, the defendant Breslauer, who had commenced suit in the Fourth District Court against said Reinstein & Mamlock, issued an attachment therein, and placed the same in the hands of the defendant, White, who was then Sheriff of the City and County of San Francisco, with instructions to attach the property in question; that the defendants thereupon attached said property then being in the Pacific Mail Steamship Company's Office, and the same was subsequently sold under execution in said suit by the defendant White, and the proceeds of sale, deducting fees and expenses were paid over to defendant Breslauer; that the goods were sold at Sheriff's sale, for gold coin, and brought eleven hundred

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and eleven dollars and fifteen cents. Defendants' counsel then objected to the jurisdiction of the Court, on the ground that the United States Courts alone had jurisdiction of the subject-matter of the action, as stated by counsel, which was the collection of the assets of the bankrupts, Reinstein & Mamlock. The Court overruled the objection, and the defendants, by their counsel, duly excepted. Defendants' counsel then moved the Court for a nonsuit on plaintiff's opening, on the ground that the complaint contained no allegation as to the bankruptcy of Reinstein & Mamlock, nor averred any facts showing the appointment of plaintiff as their assignee; but was a complaint in trover to recover the value of goods taken from the possession of plaintiff, and as he only claimed to be able to show a constructive possession, arising from his appointment as assignee, and the adjudication of bankruptcy, and these facts were not averred, evidence in support thereof would be inadmissible under the pleadings, and plaintiff could not recover.

It was admitted by plaintiff's counsel that no actual possession of the goods by the plaintiff could be shown, but that the title of plaintiff to the goods in question, and their value, arose only by virtue of the proceedings against Reinstein & Mamlock in bankruptcy, and his appointment as assignee. The Court overruled the objection, and denied the motion, and defendants' counsel excepted.

Plaintiff then offered in evidence a certified copy of the record in bankruptcy in the United States District Court for the District of New York, in the matter of O. Reinstein & S. Mamlock, in bankruptcy, showing a petition, filed October 22d, 1868, by C. F. A. Dambmann, the plaintiff herein; a deposition of said Dambmann to the Act of Bankruptcy, and a deposition of said Dambmann to the claim of the petitioning creditor, all of which papers, except the petition which was dated October 21st, 1868, are dated October 22d, 1868; an order to show cause why the prayer of said petition should not be granted, dated October 22d, 1868, an adjudication in bankruptcy against said Reinstein & Mamlock, dated February 8, 1869. It was recited in said adjudication that on the return of the order to show

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cause, the said Reinstein & Mamlock appeared by attorney, and denied the allegations of the petition, and demanded a trial, but subsequently filed their written stipulation, withdrawing their said answer and denial. Said record also contained a certified copy of assignment in bankruptcy, but no order or instrument of any kind evidencing the appointment of said plaintiff as assignee, except the recital contained in the certified copy of the assignment as aforesaid.

Defendants' counsel objected to the introduction of the foregoing evidence, to wit: the certified copy of the proceedings in bankruptcy, on the grounds: First — That the same was irrelevant, as no averment was made in the complaint of the bankruptcy of said parties, or of the appointment of plaintiff as assignee, but that the action was one by plaintiff in his individual capacity; Second — That the Court had overruled the demurrer to the complaint filed in the cause, on the ground that the action was one by the plaintiff, in his individual right, and not in the representative capacity as assignee; and, Third — That the said evidence was not the best evidence to prove the appointment of plaintiff as assignee, but that the same should be proven by a certified copy of the order appointing him said assignee. The Court overruled the said objections and admitted the evidence, and defendants' counsel excepted.

Plaintiff then offered in evidence the deposition of F. Mamlock, taken before "the Honorable J. B. Williamson, of Marshall, Harrison County, State of Texas," to whom the commission of this Court was issued, in the words as above quoted, but failing to state, or show that he was a Judge of any Court, or an officer authorized by statute to take depositions. The certificate at the foot of the deposition reads as follows:

"Examination taken reduced to writing, and by the witness subscribed and sworn this 11th day of July, 1871, before me.

J. B. WILLIAMSON,
Judge 6th District,
Commissioner."

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Defendants' counsel objected to the reading of this deposition, on the following grounds: First, that the commission under which it was taken, had been issued without notice to defendants' counsel, as prescribed by law; second, that it does not appear to have been issued to a Judge, or Justice of the Peace, or a Commissioner, as prescribed by law.

It was admitted here that the only notice given by plaintiff of his application for a commission was as follows: That a copy of an order made by the Court Commissioner, dated March 3, 1871, to the effect that the defendant, or his attorney, show cause on the 4th day of March, on the affidavit accompanying said order, and on the papers on file, why an order should not be made that commissions issue to parties to be designated by the Court, was served on defendants' attorneys March 3, 1871. The Court overruled the objection, and defendants' counsel excepted.

The Court rendered judgment for the plaintiff and the defendants appealed.

Grey & Brandon, for the Appellants.

If it should be contended that the mere description of the plaintiff as assignee, etc., would be equivalent to pleading the Act of Bankruptcy and all necessary proceedings up to his appointment; it certainly could not be held to include the allegation of the execution of the instrument of assignment, which is a subsequent act to be performed by the Judge, or in certain cases only, by the Register, and which does not necessarily follow on his appointment. (See U. S. Bankrupt Act, Section 14.) Our Practice Act provides that the facts constituting the cause of action must be stated. The facts necessary to be alleged, and which we were entitled to controvert, and to be prepared to disprove, were: The Act of Bankruptcy; the adjudication thereof; the appointment of the plaintiff as assignee by the Judge, or if appointed (as in this case) by the Register; the existence of the facts authorizing the Register to appoint, and his appointment by the Register; and the assignment to him of the effects of the bankrupt. We were entitled to

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know the place where, and the time when, the assignment was made, to be able understandingly to plead to the averment; for the proceedings might have been had at any time subsequent to the 1st of June, 1867, or in any State from Maine to Texas. We were entitled to plead the Statute of Limitations, if the action had not been brought within the proper time. We were entitled to know where the proceedings were taken to entitle us to inquire as to the validity.

If the complaint was not an action by plaintiff as assignee in bankruptcy, but was one in his private capacity as an individual (as, indeed, was held by the Court in overruling the demurrer, treating the words assignee, etc., as merely *descriptio personæ*), then the plaintiff should not have been permitted to treat it as an action by himself in his official capacity as assignee. He has availed himself of the former construction made by the Court, and can not now shift his position. The maxims apply: "*Qui tacet consentire videtur*;" and, "*Allegans contraria non est audiendus*."

The Court erred in denying defendants' motion for a nonsuit. Plaintiff's counsel had admitted in his opening that no actual possession of the goods by the plaintiff could be shown, but that his title thereto or to their value arose only by virtue of proceedings in bankruptcy against Reinstein & Mamlock. We submit that the law is, that where one sues in a representative capacity for goods which have never been in his possession, he must plead the facts showing his title. (*Halleck v. Mixer*, 16 Cal. 574; *Barfield v. Price*, 40 Cal. 535.) These cases refer to pleadings by administrators, etc.; and an assignee in bankruptcy is, in effect, the administrator of the estate of a living person. (*Wheelock v. Hastings*, 4 Met. 509.) Where actual possession has existed, it is true there need not be any averment of title, but where only the right of possession exists, as in the case at bar, it must be. (Starkie on Evidence, 1st Am. ed. 1826, by J. Metcalf, vol. 3, * pp. 1483 and 1484. None of these facts necessary to enable plaintiff to recover as assignee having been pleaded, and plaintiff having admitted that he could not show any actual possession, the evidence in support of plaintiff's title in his representative character was inadmis-

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sible, and a motion for a nonsuit on the opening should have been granted.

On the grounds above stated the Court erred in admitting the copies of the proceedings in bankruptcy. These were entirely irrelevant in any action based only on the title of the plaintiff in his private capacity, or on his actual possession; but even construing the pleading as containing an averment of all proceedings up to, and including his appointment as assignee, then the copy of the assignment certainly should not have been admitted, for there was no averment of any assignment (which, as we have seen) under section fourteen of the U. S. Bankruptcy Law is a separate and subsequent Act to be performed, and therefore a separate fact to be alleged. This section provides also that the copy of the assignment shall be conclusive evidence of the assignee's title. Evidence of what? It can only be made evidence of some fact, or facts, which it was necessary to plead, and which might be put in issue. And those facts would be the adjudication of bankruptcy, the appointment of plaintiff as assignee, his qualification, the assignment by the proper officer — in other words, his title.

Have the State Courts jurisdiction of actions by an assignee in bankruptcy to collect the assets of the bankrupt? There have been numerous decisions in other States, as in the United States Courts, on both sides of the question, but the question on this express point is a new one in this State; and this Court, whatever its decision may be, will have to disregard some decisions heretofore made. We have used the expression "express" point, because, as we shall hereafter show, the question has been settled by this Court on two occasions, upon a precisely analogous one. The decisions up to the submission of this cause would seem to have been mostly to the effect, that State Courts had jurisdiction in the cases stated, but since the submission the well considered cases cited in our petition for rehearing came to hand, to which we again invite the attention of the Court. They are: *Voorhees, assignee, v. Fisher & Morrow* — Supreme Court of Michigan; cited in Albany "Law Journal," February 1st, 1873, and in "Pacific Law

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Reporter," March 25th, 1873, from which we extract the following: These cases hold that the State Courts have not jurisdiction. See also *Sherman v. Bingham et al.*, U. S. Supreme Court; cited in "National Bankruptcy Reporter," vol. 1, No. 10, 1872; *Martin v. Hunter*, 1 Wheat. 330; *McLean v. Lafayette Bank*, 3 McLean, 310; *Stevens v. U. S.*, Paine, 311; *Bingham v. Clafin*, Supreme Court Wisconsin, "National Bankruptcy Reporter," vol. 7, No. 9.

Two contrary decisions have also appeared, viz: *Gilbert v. Priest*, Sup. Ct. New York, "American Law News," Feb., 1873, p. 26; *Paysen v. Dietz*, U. S. Circuit Court, Iowa; "Pacific Law Reporter," Oct. 7, 1873. The former, however, is not the decision of an appellate Court; and in the latter, the question of the jurisdiction of State Courts is not involved, but the Court assumes it, and as mere *obiter* limits the jurisdiction of State Courts to cases where the assignee resorts to them with consent of the Bankruptcy Court. And both seem to be based on the fact that Congress has not in terms given exclusive jurisdiction to the United States Courts; the learned Judges seeming to have overlooked the point that Congress has no power either to give to, or take away from the State Courts jurisdiction in any way. (*Ex parte Knowles*, 5 Cal. 300.) And not to have realized that "exclusive jurisdiction necessarily attends exclusive legislation." (*United States v. Ames*, 1 Woodbury & Minot, 76; *United States v. Cornell*, 2 Mason. C. C. Rep. 91; *United States v. Bailey*, 9 Peters, 261.

Doyle & Barber, for the Respondent.

The complaint is sufficient. If the averments as to plaintiff's assigneeship are omitted as surplusage, the complaint, as a pleading, is good. Treating those averments as material, the complaint is equally good. (See Forms, 2 Chitty Pl. 33, 838, 839, 840; 1 Abbott's Forms, edition of 1871, p. 131, form 174; *Hastings v. Fowler*, 2 Carter, Ind. 217.) Whether the plaintiff sued individually or as assignee, the evidence given by him proved his case in either aspect. He proved the legal title in himself by proving property in his assignors, and an assignment from them, and by this

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evidence he also satisfied all the allegations of the complaint in respect to his representative character. (See Willes R. 104, note *a*; 1 Chitty Pl. 68, 69, note 3; *Valentine v. Jackson*, 9 Wend. 302; *Evans v. Moore*, 2 Cowp. 569; Bankrupt Act, Sec. 14.)

It may admit of question whether, when a right of property is created by the laws of the United States, Congress has the power to prohibit the holder of such title from claiming under it any relief which a State Court, in the exercise of its ordinary powers, would be able to give him, if he had acquired title from any other legal source. But it is unnecessary to pursue this inquiry, as Congress has not conferred upon the Federal Courts exclusive jurisdiction of such suits as the present. (Story on the Constitution, Secs. 1,752, 1,753, 1,754.)

The jurisdiction of a State Court of law over an action of trover, is a part of the primitive common law jurisdiction of such Court, and is not ousted by reason of a grant of a similar jurisdiction to the Federal Courts in cases where the plaintiff's title is derived through an Act of Congress. In cases where there is no exclusive grant of jurisdiction to the Federal Courts, if the State tribunals are so organized as to afford redress, it may be obtained therein. (*Peale v. Felton*, 1 Coms. 545; see also 1 Kent, *390, *397, and note; *Ward v. Jenkins*, 10 Metc. 584; *Hastings v. Fowler*, 2 Carter, Ind. 216; *Pindell v. Vimont*, 14 B. Monroe, 400.)

The very first case cited by the appellant, (*Voorhies v. Frisbie*, 8 National Bankruptcy Reg. p. 155,) admits that, in a case such as the present, the State Courts have jurisdiction. *Payson v. Dietz*, (8 N. B. Reg. 195,) expressly concedes such jurisdiction in the State Courts. *Sherman v. Bingham*, (5 N. B. Reg. 38,) admits the jurisdiction of the State Courts. It appears, from the opinion in the case on appeal, that the larger part of the suits arising in Massachusetts on bankruptcy titles, are brought in the State Courts, (7 N. B. Reg. p. 497,) and the jurisdiction of the State Courts is conceded by the appellate tribunal. In *Gilbert v. Priest*, (8 N. B. Reg. 161, 63 Barb. 339,) the

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direct question was presented, whether the State Court had jurisdiction of a suit by the assignee in bankruptcy to set aside a conveyance executed in favor of the provisions of the bankrupt law. After an attentive examination of the question, the Court decided in favor of the jurisdiction. *Peiper v. Harmer*, (5 N. B. Reg. 252,) maintains that State Courts have jurisdiction of an action by the assignee on a cause which accrued to the bankrupt. (*In re Central Bank*, 6 N. B. R. 207.) Injunction applied for to restrain assignee from bringing suit in State Court, to recover from a creditor the amount of a preferred debt paid in violation of the bankrupt law, on the ground that such Court had no jurisdiction. Denied, on the ground that the Court "never supposed the effect of the Bankrupt Act to be to oust the jurisdiction of the State Courts."

It has been decided in several cases that suits by the assignee cannot be brought in any other Federal Court than that having jurisdiction in the District where the proceedings in bankruptcy were commenced. (*Payson v. Dietz*, 8 N. B. R. 193; *Sherman v. Bingham*, 5 N. B. R. 34; *Jobbin v. Montague*, 6 N. B. R. 509; *Paine v. Caldwell*, 6 N. B. R. 562; *in re Richardson*, 2 N. B. R. 74; *Markson v. Heaney*, 4 N. B. R. 165.) It is true that decisions may be found, asserting that, in such case, any United States District Court has jurisdiction; but the weight of authority is decidedly the other way. No doubt a State Court would have jurisdiction of an action of trover brought by a foreign assignee in bankruptcy, (*Bird v. Caritat*, 2 J. R. 344; *Milne v. Moreton*, 6 Binney, 374; *Goodwin v. Jones*, 3 Mass. 517,) although the foreign Bankruptcy Court might have exclusive jurisdiction of all proceedings in respect to the fiat in bankruptcy, the discovery and distribution of the bankrupt's assets, and the operation of the law on the bankrupt personally. So of an action brought by an assignee, deriving title through the insolvent law of a sister State, which provides that a certain Court in that State should have exclusive jurisdiction in all matters of insolvency. It would be a strange anomaly to concede such jurisdiction in the

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case of foreign assignees, and deny it in the case of an assignee appointed under the Act of Congress.

By the Court, CROCKETT, J.:

The demurrer to the complaint was properly overruled. The statement in the complaint that the plaintiff is assignee in bankruptcy of Reinstein & Mamlock, may be treated as surplusage, or at most as *descriptio personæ*, and may be disregarded without impairing the sufficiency of the complaint. Nor did the Court err in denying the motion for a nonsuit on the plaintiff's opening statement. Under the general averment in the complaint, that "the plaintiff was possessed as of his own property" of the goods and chattels enumerated, he was entitled to show by proof that he had acquired the title by means of the proceedings in bankruptcy. These were probative facts, not necessary to be averred in the complaint. The ultimate fact to be proved, and which was averred, was that the title was in the plaintiff, and it was unnecessary to state in the complaint how he acquired it. In suits by or against executors or administrators, their representative character must be averred in pleading, as was held in *Halleck v. Mixer* (16 Cal. 474), and *Barfield v. Price* (40 Cal. 535), for their right to sue and be sued, results by operation of law from the relation which they occupy toward the estate; and this relation must be averred, and proved if denied. But in proceedings in bankruptcy, the legal title vests in the assignee under the assignment. Whatever right the bankrupt had is assigned to and vests in the assignee, who thereby becomes, for the purpose of maintaining or defending suits, "possessed as of his own property" of the estate assigned to him. It is true he holds the title and the property when recovered in trust for certain purposes specified in the statute. But as between him and a stranger he holds the title, and may assert it in the same form of action as though he owned the fee. This view of the law disposes also of the objection to the introduction in evidence of the proceedings in bankruptcy. If it was unnecessary to set them out in the com-

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plaint, it was, of course, competent to prove them without the averment. Nor was it necessary to prove all the steps in the proceeding, inasmuch as section fourteen of the bankrupt law provides that a copy of the assignment shall be conclusive evidence of the assignee's title, and in this case a copy of the assignment was put in evidence.

The objections made to the depositions offered by the plaintiff are untenable.

Section five hundred and seventeen of the Practice Act authorizes the Court to shorten the time whenever "a written notice of a motion is necessary;" and under section four hundred and thirty-three a written notice is necessary of an application for a commission to take the deposition of a witness in another State. The order to show cause and the issuing of the commission were equivalent to an order shortening the time, and dispensed with the necessity of any other or further notice. The objection that it does not appear on the face of the commission that the person to whom it was addressed was a Judge or Justice of the Peace is frivolous. The presumption is, that on granting the commission, the Court, or officer who ordered it, performed his duty and directed it to a person who was qualified to execute it. Furthermore, the return to the commission shows that the person to whom it was directed, and who executed it, was a District Judge.

We deem it unnecessary to notice the other points discussed by counsel.

Judgment affirmed.

Mr. Chief Justice WALLACE did not express an opinion.

The foregoing opinion was delivered at the April term, 1873, and a rehearing having been granted, the following opinion was delivered at the July term, 1874.

By the Court, CROCKETT, J.:

The argument on the rehearing has not convinced us that our former opinion ought to be modified. But the point is

Points decided.

now made for the first time on the appeal, that a State Court had no jurisdiction of the action, and that the plaintiff's remedy was by some appropriate proceeding in the United States District Court. The authorities are not uniform on the question whether an assignee in bankruptcy can maintain an action in a State Court to recover property disposed of by the bankrupt, in fraud of the Bankrupt Law. But we think the weight of authority, and supported by the better reasoning, maintains the jurisdiction of the State Courts, in that class of cases when the nature of the action is such that the proper relief can be administered in that forum. In this case, the action is trover in the usual form, and the judgment is for damages. The Court was competent to afford the necessary relief in an action of that nature, and properly entertained jurisdiction of the cause. We deem it unnecessary to review the authorities on this point, but the question was expressly decided and the authorities collated, in the recent case of *Gilbert v. Priest*, 63 Barb. 339 (Nat. Bankruptcy Reg. 161). The reasoning in that case, in support of the jurisdiction of the State Courts, appears to us not only to be conclusive, but to be in consonance with the weight of authority.

Judgment and order affirmed. Remittitur forthwith.

Mr. Justice McKINSTRY did not express an opinion.

[No. 4,376.]

JOHN PARNELL v. JOHN HANCOCK AND JOHN F. LYONS.

SURETIES ON APPEAL BOND.—The sureties on an appeal bond cannot be sued until the judgment against their principal is in a condition to be enforced by an execution.

IDEM.—So long as there is an order of Court in force, staying execution on the judgment, against a party who had appealed from a lower Court, the sureties on his appeal bond cannot be sued.

APPEAL from the District Court, Third Judicial District, City and County of San Francisco.

Argument for Appellant.

John Gorman obtained a judgment in the Justice's Court of the City and County of San Francisco, against Black and Durkin. Black appealed to the County Court, and Porter and others became his sureties. The County Court gave judgment against Black and Durkin. Porter, one of the sureties, was sued on the appeal bond, by Parnell, the assignee of Gorman, and judgment rendered against him in the Justice's Court on the 7th day of December, 1870, for one hundred and forty-six dollars and forty-eight cents. On the 27th of December, 1870, Porter appealed, and defendants Hancock and Lyons became his sureties. On the 12th day of July, 1870, the County Court gave judgment against Porter for three hundred dollars and twenty-five cents including principal and costs. In the judgment was a clause directing that execution be stayed until the further order of the Court, and until an assignment of the judgment of Gorman against Black and Durkin, be made to Porter, their surety. In this state of the case, while the execution on Parnell's judgment against Porter was stayed, he commenced a suit against Porter's sureties on appeal, Hancock and Lyons, to recover his judgment against Porter, the three hundred dollars and twenty-five cents. The Court below gave the plaintiff judgment, and the defendants appealed.

A. M. Heslep, for the Appellant.

The judgment in the premises is dependent on the character of the liability of Porter. If the judgment could be enforced against Porter, counsel admits the liability of the defendants and appellants. The liability of appellants rests upon the conditions of the bond. The judgment against Porter cannot be enforced until the performance of a condition precedent, *a fortiori*, the appellants are not liable until the condition precedent is complied with. The pleadings show a non-compliance; therefore, their liability is not fixed, for it is not a liability *in esse*, but *in futuro*. The judgment in this case involves the strange proposition that the appellants have incurred a higher degree of liability than the principal. This doctrine was urged on the ground

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that the bond is an independent obligation; and *Murdock v. Brooks*, 38 Cal., is relied on to sustain this view of the case. The appellants insist the bond is not of that character, for the liability thereon is dependent on the status of the principal towards the plaintiff and respondent.

J. C. Bates, for the Respondent.

By the Court, WALLACE, C. J.:

Gorman had recovered a judgment against Black; the latter thereupon took an appeal to the County Court, Porter becoming one of his sureties, and upon trial had in that Court, judgment had again been rendered against Black. Gorman thereupon assigned to Parnell, the plaintiff here, the judgment and the undertaking on appeal given in the Black case, and the plaintiff, as assignee of Gorman, subsequently recovered judgment in his own name against Porter on the undertaking on appeal. From this judgment Porter, having appealed to the County Court, and the defendants here having become his sureties on the appeal, judgment was rendered in the latter Court against Porter, and in favor of the plaintiff, Parnell, but directing a stay of execution against Porter until the plaintiff should assign to Porter the judgment against Black, which the plaintiff held by assignment from Gorman.

These facts (and the further fact that Parnell had not assigned to Porter the judgment against Black), appearing by the pleadings, the Court below, upon motion, gave judgment for the plaintiff. We think, however, that in this there was error.

Before the defendants, as sureties of Porter, can be sued, Porter, their principal, must himself have become absolutely liable to pay the judgment in the County Court. It is true, as observed by the counsel for the respondent at the argument, that under the law as settled here it would not be necessary for the plaintiff to have actually issued an execution against Porter before he could maintain an action against the defendant as his sureties in the undertaking on

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appeal. But it is equally clear that, unless the case be in such a condition as that the plaintiff might have issued an execution against the principal, had he desired to do so, he cannot proceed against the sureties on the appeal. To hold that he could, would be to place the sureties in a position apparently less favorable than that occupied by their principal. Besides, it would be to allow the plaintiff, while proceeding in this action, upon the judgment of the County Court, to wholly ignore that portion of it by which satisfaction was denied to him, until he should make to Porter the assignment therein mentioned. We have, in considering the case, assumed, of course, that the direction found in the judgment of the County Court, that Parnell assign the Black judgment to Porter, is valid in point of jurisdiction. We so held it when the judgment was lately before us upon *certiorari*.

Judgment and order denying new trial reversed, and cause remanded. Remittitur forthwith.

Mr. Justice RHODES did not express an opinion.

[No. 3,811.]

ALPHEUS BULL v. SAMUEL B. SHAW, LAURA SHAW, HIS WIFE, AND CLAY DELANEY ET AL.

MORTGAGE ON PUBLIC LAND.—If a person is residing on public land subject to preëmption, and executes a mortgage thereon, and then sells the land to another, who takes possession and afterwards preëmpts the land and obtains a title from the United States, the mortgage cannot be enforced against the title thus acquired from the United States, because the preemptor does not deraign his title from the United States through the person who executed the mortgage.

APPEAL from the District Court, Second Judicial District, County of Tehama.

Action to foreclose a mortgage, executed by S. B. Shaw to J. N. Williams, on the 21st day of November, 1867, on the northeast quarter and north half of southeast quarter

Argument for Appellant.

of section twelve, township twenty-four north, range two west, Mount Diablo base and meridian. The plaintiff was the assignee of the note and mortgage. The land was public land when the mortgage was given, and Shaw was residing on it. On the 1st day of October, 1868, Shaw sold the land to J. W. Delaney for the consideration of one thousand five hundred dollars, and delivered him possession. The granting clause in the mortgage was "do grant, bargain, sell and confirm unto the party of the second part, and to his heirs and assigns forever." In June, 1869, J. W. Delaney filed his declaratory statement as a preemptioneer, and died in November, 1870. Clay Delaney, the administrator of his estate, on behalf of his heirs, on the 23d of March, 1871, proved up, entered and paid for the land. This action was commenced October 10, 1870, and after the death of J. W. Delaney, his widow, Louisa Matilda, and his children were made defendants. The Delaneys were made defendants as purchasers from Shaw, after the execution of the mortgage.

The attorneys for the appellant claimed that Delaney bought subject to the mortgage, and that he and his heirs were estopped from denying Shaw's title, and the validity of the mortgage. The Court below enforced the mortgage as against Shaw, but dismissed the bill as to the Delaneys. The plaintiff appealed from that portion of the judgment which dismissed the bill as to the Delaneys.

W. Henry Jones and John Currey, for the Appellant.

The effect of the judgment, dismissing the action as to the Delaneys, is, that their title in and to the land claimed by them, was and is superior and paramount to the lien of the mortgage, and, therefore, is not subject to it, notwithstanding the ancestor of the defendants, the Delaneys, entered into and held the possession and enjoyment of such land, by purchase from Shaw, the mortgagor, subject to the mortgage, by express understanding and agreement. When the mortgage was made, Shaw was in the actual possession of the land and improvements thereon, mortgaged

Argument for Respondents.

by him. Possession is evidence of title. The land and improvements were proper subjects of disposition by grant, devise, or mortgage. (*Tartar v. Hall*, 8 Cal. 263; *Houseman v. Chase*, 12 Cal. 290; *Whitney v. Buckman*, 13 Cal. 536; *Haffler v. Maier*, 13 Cal. 14; *Clark v. Baker*, 14 Cal. 612.) The mortgagor, by virtue of his mortgage, became estopped from denying that he owned the land when he mortgaged it; for the words of grant were broad enough to carry and transfer to the grantee any title the grantor might afterwards acquire. In such case, "the interest, when it accrues, feeds the estoppel." The after interest acquired by Delaney inured to the benefit of the mortgagee, and he was bound to preserve the property for the purposes of the security. (*Barber v. Harris*, 15 Wend. 617; *Clark v. Baker*, 14 Cal. 625; *Kirkaldie v. Larrabee*, 31 Cal. 445; *Christy v. Dana*, 34 Cal. 553.)

W. C. Belcher, for the Respondents.

The Delaneys claim only as purchasers from the United States. The government, through its proper officers, had recognized their right to purchase, and had sold the land to them. They held in privity with the government, but not in privity with Shaw — not in subordination to the lien of the plaintiff's mortgage.

Counsel for appellant urge that the mortgage of Shaw purported to convey the fee — that J. W. Delaney succeeded to Shaw's possession of the land, and that under the decisions in *Clark v. Baker*, 14 Cal. 625; *Kirkaldie v. Larrabee*, 31 Cal. 455, and *Christy v. Dana*, 34 Cal. 553, all titles acquired by him, or by his wife and children, must be held subject to the lien of the plaintiff's mortgage — that the Delaneys all stood in such relation of trust to the holder of Shaw's mortgage that they could not be allowed to set up any title in themselves to defeat that lien.

The facts in these cases are not like the facts in the case at bar. In *Clark v. Baker*, Clark sold and conveyed the mortgaged property to Baker, and took a mortgage back for the purchase-money. Subsequently, Baker, finding that Touchard held the true title to the property, bought

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that also, and gave a mortgage back for the purchase-money. The second mortgage was foreclosed without making Clark a party, and Boyreau bought the property at Sheriff's sale under the decree. He purchased Baker's interest in the property, and put himself in his shoes. The question was, whether Baker or his *locum tenens* could be heard to say that his mortgage, purporting to convey the title, did not convey it, when the statute had declared that when one had used words "purporting to convey the fee to lands, all titles subsequently acquired by the grantor should immediately pass to the grantee." Baker had used those words as the words of conveyance in his mortgage, and had subsequently acquired the true title, and subsequent to that, Boyreau, as purchaser at Sheriff's sale, had stepped into his place, having no other rights, in respect of the property, than Baker had. The Delaneys, respondents here, do not stand in the predicament of Larrabee; they are not seeking to defeat a mortgage made by them, but simply to protect from sale, to satisfy the debt of a stranger, the title acquired by them from the government.

In the case at bar, Shaw, at the date of the mortgage, had no title, nor did he buy in or acquire the true title. He did not convey to J. W. Delaney any title. He did what is frequently done among settlers upon public lands, left the premises, and Delaney entered upon them, and subsequently took the proper steps to acquire title from the government.

By the Court, MCKINSTRY, J.:

The thirty-third section of the "Act concerning conveyances," provides in effect that if any person (not having the legal estate) shall convey land by conveyances purporting to convey the same in fee simple, and shall afterward acquire the legal estate, the estate subsequently acquired shall immediately pass to his grantee.

If Shaw had acquired the Government title after the execution of the mortgage, and, still later, had conveyed to Delaney, the latter and his heirs would have been es-

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topped from asserting such title against the mortgage, because, in that case, Delaney would have acquired the title from Shaw, in whose hands (by operation of the statute) it had already been subjected to the mortgage lien. (*Kirkaldie v. Larrabee*, 31 Cal. 455; *Clark v. Boyreau*, 14 Cal. 636.)

Delaney, however, did not deraign his title from the United States through Shaw, and the statute does not provide that any estate or title which may be acquired by the assignee or grantee of the mortgagor shall be bound by the mortgage.

Delaney was let into the possession by Shaw, but the latter had taken no steps to acquire the title from the United States, and it does not appear that he had contracted to acquire it for the benefit of his mortgagee. If he had acquired the government title, it would have been subservient to the mortgage; this, however, simply by virtue of the statute. The Courts could not recognize any supposed equity growing out of a contract (had any been entered into) that the mortgagor would secure the government title as additional security, because such contracts are in derogation of the policy and land laws of the United States. Delaney would occupy a position no less to be favored than that of his grantor.

The fact that he got possession from Shaw, does not affect the question. If he had acquired a superior title from any other source than the United States, he could not have been deprived of the possession he received from Shaw by a purchaser at the mortgage-sale. That the possession was one of the elements employed in obtaining the title was merely an incidental advantage.

Judgment and order affirmed.

Neither Mr. Chief Justice WALLACE nor Mr. Justice NILES expressed an opinion.

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[No. 2,633.]

THOMAS EDWARDS v. THE SOUTHERN PACIFIC
RAILROAD COMPANY.

CHANGE OF VENUE.—If the action is brought in a county other than that in which the defendant resides, and he moves for a change of venue on this ground, the plaintiff, if he wishes to have the action tried in the county where the action was brought, on account of the convenience of witnesses, must make a counter motion to have it retained. He cannot permit the venue to be changed, and then move to return the case to another county.

APPEAL from the District Court, Twentieth Judicial District, County of Santa Clara.

The defendant was a corporation. The action was commenced in the county of Santa Clara. The defendant moved to change the venue to the City and County of San Francisco. The Court denied the motion, and the defendant appealed from the order.

The other facts are stated in the opinion.

Frs. E. Spencer and McCullough & Boyd, for the Appellant.

B. P. Rankin and Wm. Matthews, for the Respondent.

S. W. Sanderson, for the Appellant, in reply.

By the Court, RHODES, J.:

The motion to change the venue of this case was based on the fact that the principal place of business, and, therefore, the residence of the defendant, is in the City and County of San Francisco, and not in the county where the action was brought. The plaintiff made a motion to retain the cause, on the ground that the convenience of witnesses would thereby be promoted. The motions were made before the Code of Civil Procedure took effect.

It is insisted that the defendant has the absolute right to a change of venue; and that if it should appear after the

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venue is changed that the convenience of witnesses will be subserved by changing the venue back to the county where the action was brought, or any other county, the order may then be made, upon a proper motion.

In *Jenkins v. California Stage Company*, 22 Cal. 537, this question was presented for consideration. The defendant moved for a change of venue on the same ground as in this case, and the plaintiff opposed it on the ground that the convenience of witnesses and the ends of justice would be promoted by refusing the change; and this Court affirmed the order of the Court below in refusing to change the venue. In support of that decision the Court cited *Loehr v. Latham*, 15 Cal. 418, and *Pierson v. McCahill*, 22 Cal. 127. In the first case, the Court intimated that that was the proper practice, and in the last case the venue had been changed, on the motion of the defendant, to the county in which he resided, and the plaintiff thereafter moved to change the venue to the county in which the action was brought, on the ground that the convenience of the witnesses would thereby be promoted; and it was held that the motion came too late — that it should have been made when the defendant applied for the change. This rule has been acquiesced in, and acted upon, for many years, and was followed in the recent case of *Hanchett v. Finch*, 47 Cal. 192, and we do not feel justified in giving a new construction to the provisions of the Practice Act, involved in the question.

Order affirmed.

Neither Mr. Justice NILES nor Mr. Justice MCKINSTRY expressed an opinion.

Argument for Appellants.

[No. 3,689.]

**GEORGE O. WHITNEY, CHARLES M. KIMBALL
AND J. WAYLAND KIMBALL v. P. DURKIN AND
ANN DURKIN.**

EVIDENCE OF DECLARATIONS.—In an action for goods sold, when the issue made is, whether the credit was given to the defendant who obtained the goods, or to another person, the declarations of the vendor made to such other person, after the transaction has been completed, and some time has elapsed, are not a part of the *res gestæ*, and are not admissible in evidence on behalf of the plaintiff.

APPEAL from the District Court, Fourth Judicial District, City and County of San Francisco.

Action to recover seven hundred and ninety-five dollars, the value of goods sold. The complaint alleged that the goods were sold to the defendants at their special instance and request. The answer averred that one Charles D. Carter was indebted to the defendant P. Durkin in the sum of seven hundred and ninety-five dollars, and in consideration thereof, gave the defendants an order in writing on the plaintiffs for goods to that amount, and that the plaintiffs delivered the goods on the order, and gave the credit to Carter. The plaintiffs recovered judgment; the defendants moved for a new trial, and the Court granted the motion. The plaintiffs appealed from the order granting a new trial.

The other facts are stated in the opinion.

Parker & Roche, for the Appellants.

Whitney's declarations to Carter, when he visited him, are the only means of explaining the object of the visit, and to show that it was not to collect money due him by Carter. (Taylor on Ev. Sec. 516; *Stewart v. Hanson*, 35 Maine 507; *Pool v. Bridge*, 4 Pick. 378; and *Allen v. Duncan*, 11 Pick. 308.)

J. C. Bates, for the Respondent.

Whitney could not, by his own statements to Carter, manufacture evidence in his own behalf after the transaction had completely ended and the liabilities of the parties had become fixed.

By the Court, NILES, J.:

The new trial was granted solely upon the ground of "errors of law committed by the Court during the progress of the trial, and excepted to by the defendants." The principal issue at the trial was whether, at the time of the sale and delivery of the goods, the credit was given to the defendants or to Carter, the drawer of the order. The only exception taken by the defendants was to a portion of the testimony of Geo. O. Whitney, one of the plaintiffs. The witness had stated that after the sale and delivery of the goods he visited Carter several times to procure payment by him of the amount of the claim, and was unsuccessful. He was then permitted to testify, against the objection of defendants, in substance, that on the occasion of his last visit he informed Carter that he did not hold him responsible for the price of the goods; that he had nothing to hold him at all in any way, especially in the manner the goods were sold to the defendant at the time of the sale; nothing but a simple order on him, etc.

This testimony was clearly inadmissible. The declarations were not parts of the *res gestæ*. The rights and liabilities of the several parties were fixed at the time of the sale and delivery of the goods. It is difficult to see how a declaration of the plaintiff, made several weeks later, and in the absence of the defendants, could form a part of, or in any degree illustrate or explain the past and completed transaction.

We cannot say that the testimony was immaterial. Its direct tendency would be to impress the minds of the jury with the belief that the plaintiffs had not intended to give the credit to Carter, but to the defendants. That was an

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important issue in the case; and upon that issue the testimony was inadmissible. We think the new trial was properly granted.

Order affirmed. Remittitur forthwith.

[No. 3,992.]

ERNST DUNKER v. CATHARINE LUTZ AND JOHN HOUCK.

ALIAS SUMMONS.—The Clerk of the District Court is authorized, on demand of the plaintiff, and without an order of Court, to issue an *alias* summons after the expiration of the year during which the original must be issued.

APPEAL from the District Court, Fourth Judicial District, City and County of San Francisco.

On the 15th day of November, 1865, the plaintiff obtained a judgment against the defendants in said Court, for five hundred and ninety-nine dollars and costs. On the 15th day of November, 1869, he commenced suit on the judgment by filing a complaint and procuring a summons to be issued. On the 19th day of February, 1872, the summons was served on defendant Lutz, and returned to the Clerk's Office on the 2d day of March, 1872, not served on defendant Houck. On the 13th day of February, 1873, the Clerk of the Court, without an order of the Court, on demand of the plaintiff, issued an *alias* summons, which was served on the defendant Houck on the 15th day of February, 1873. On the 19th day of February following, defendant Houck gave the plaintiff notice that he would move the Court to quash the summons and return thereon, because the same was issued improvidently and without any authority of law, and for neglect and laches of the plaintiff. The motion was heard upon affidavits, and upon the papers in the case. The plaintiff's affidavit alleged that defendant Houck had concealed himself to avoid the service of summons, and that the summons had been served

Argument for Respondent.

as soon as the plaintiff had found him. The Court denied the motion. The plaintiff had judgment, and the defendant appealed from the judgment, and from an order denying a new trial.

N. Hamilton and Beatty & Denson, for the Appellant.

The Court erred in failing to quash the summons which was issued on the 13th of February, 1873, and the return thereon. (*Dupuy v. Shear*, 29 Cal. 239.)

The Clerk had no right to issue a summons in February, 1873.

The right to issue a summons under the complaint filed in November, 1869, expired November 15, 1870. After that date, the Clerk, on his own motion, certainly could not, and the Court probably would not, authorize the issue of an *alias* summons. (See case cited, 29 Cal. pp. 241-2.)

The Code, section four hundred and six, authorizes the Clerk at any time within one year to issue summons.

Section four hundred and eight of the Code provides that if the summons is returned without being served on any or all the defendants, the Clerk may issue an *alias* summons. But this *alias* summons, we presume, must be issued, like the first, within the year provided in section four hundred and six; otherwise, the suit might be kept alive for a century, without an effort to serve the defendant.

Even if it is intended, under the Code, to allow an *alias* summons to issue after the expiration a year, this does not apply to a case where the action was brought, and the whole period of one year had expired before the Code went into effect. This would be to give the Code a retroactive effect, and to revive a cause of action which was totally gone before the Code was passed.

Daingerfield & Olney, for the Respondent.

The motion to quash a summons is always addressed to the discretion of a Court, and the case of *Dupuy v. Shear*, 29 Cal. 239, cited by appellant, shows it; and where, by setting aside a summons as irregular, the plaintiff would

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be barred of his right of action by reason of the Statute of Limitations, the Court will permit an amendment to be made. (*Weare v. Slocum*, 3 How. Pr. Reps. 397.)

That the law does not require a vain thing to be done is axiomatic. Hence, if the Court would have permitted a summons to issue upon motion, it would have been folly to quash the writ issued and order another. That it would have ordered a writ to issue is plain from the finding of the Court that "the debt was due, and that the apparent laches on our part had been satisfactorily accounted for."

The practice under the code in regard to the summons should be as near that of the common law practice under the *capias* as possible. (*Blanchard v. Strait*, 8 How. Pr. 84.) Under that practice if the action was kept alive by a continuance roll, *aliases* and *pluries* writs could have issued as a matter of course and the debt would never outlaw. (See *Dupuy v. Shear*, 29 Cal. 240.) Under our Practice Act, the filing of a complaint stops the Statute of Limitations.

By the Court, McKINSTRY, J.:

I think the Clerk of the District Court, is authorized, on demand of the plaintiff, to issue an *alias* summons after the expiration of the year during which the original must be issued.

If the plaintiff is guilty of laches, by failing to serve either the original or the *alias*, the defendant may move to quash.

Judgment and order affirmed. Remittitur forthwith.

Neither Mr. Justice RHODES nor Mr. Justice CROCKETT expressed an opinion.

Argument for Appellant.

[No. 3,711.]

HAUS H. BUHNE v. SETH P. CHISM.

SELECTION OF SEMINARY LAND BY THE STATE.—The selection by the State of public land as a portion of the seventy-two sections granted to the State for the use of a seminary of learning, even if approved by the Register and Receiver of the Local Land Office, does not confer a title on the State until the selection is approved by the Secretary of the Interior, and the plaintiff must prove such approval.

SELECTION OF STATE LAND UNDER ACT OF JULY 23, 1866.—Land selected by the State prior to July 23, 1866, as a portion of the grants of public land made by Congress, does not become the property of the State under the curative Act of Congress of July 23, 1866, until the selection has been certified over to the State by the Commissioner of the General Land Office.

EJECTMENT.—The plaintiff in ejectment can recover only on the legal title.

APPEAL from the District Court, Eighth Judicial District, Humboldt County.

The complaint was in the usual form, and averred the plaintiff's ownership and seizin on the first day of January, 1872, and the ouster on the second day of January, 1872. The defendant denied the allegations of the complaint, and set up that the United States had continuously, since May 23, 1867, occupied the land for light-house purposes, and that he was the keeper of the light-house, employed by the United States at stipulated wages, and that he claimed no interest in the demanded premises. Broderson obtained his patent from the State on the 19th day of January, 1861; and on the 7th day of April, 1862, conveyed to the plaintiff. On the 8th day of June, 1866, the President made an order reserving a part of the land for light-house purposes, and May 23, 1867, he made an order reserving the remainder. The defendant was the light-house keeper. The defendant recovered judgment. The plaintiff appealed.

The other facts are stated in the opinion.

Buck & Stafford and *G. W. Spaulding*, for the Appellant.

The grant above referred to is a present grant to the State of California, only wanting identity to make it perfect.

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By the Act the title to seventy-two sections of land of the character of that in controversy vested in the State of California. (*Van Valkenburg v. McCloud*, 21 Cal. p. 330; *Higgins v. Holton*, 25 Cal. p. 252; Lester's Land Laws, pp. 244 and 264; *Cooper v. Roberts*, 18 How. p. 179; *Foley v. Harrison*, 15 Row. p. 441.) The State was vested with full power to select and locate the very land in controversy, because it answers the description of land granted to the State. As soon as the selection was made the title passed to it. (*Rutherford v. Green's heirs*, 2 Wheat. p. 196; *Lessieur v. Brice*, 12 Howard, p. 76; *Bludworth v. Lake*, 33 Cal. p. 262.) Plaintiff's grantor was a *bona fide* purchaser from the State. The land was sold to plaintiff's grantor in such manner as would have passed and did pass the State's title at the time the selection was made. (*Toland v. Mandell*, 38 Cal. p. 42; *Hodapp v. Sharp*, 40 Cal. p. 72.) If the selection in this case has been erroneous in any manner, the Act of Congress of July 23, 1866, has confirmed the selection. (14 U. S. Statutes, p. 218.) A confirmation by Act of Congress vests in the confirmer the right of the United States, and a patent if issued could only be evidence of this. (*Stoddard v. Chambers*, 2 How. pp. 316 and 372.) A confirmation by law is as fully, to all intents and purposes, a grant as if it contained in terms a grant *de novo*. And such grant, or confirmation, vests an indefeasible and irrevocable title. (3 Washburn on Real Property, p. 178, and cases there cited, * p. 525.)

L. D. Latimer, for the Respondent.

The following propositions are believed to be well settled: 1st. That the title to no particular tract of the land donated to this State by Congress (unless it may be swamp or overflowed), vests in the State until after the selection and location of such particular tract by the State, in the manner prescribed by law, and the approval of such selection and location by the United States, or its proper officers. 2d. That in making such selection and location, the provisions of the law relating thereto must be strictly pursued. 3d. That the party claiming under the State must prove the

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performance of all the acts required by law to constitute such selection and location.

The Act of Congress donating to the State the seventy-two sections, provides that all selections made by the State shall be "subject to the approval of the Secretary of the Interior." (See Sec. 12, Act of March 3, 1853; 10 Statutes at Large, 244.)

This being one of the conditions of the grant itself, it is clear that until such approval was had, the State could acquire no title to the land selected. There is not even an attempt to show such approval in this case. Neither the Register or Receiver can certify or list land over to the State, nor approve selections or locations.

Their duty is simply to receive the applications, note the selections or locations on their plats, and report the same to the Commissioner of the General Land Office. Their powers are limited. They cannot even decide a contest between preëmption claimants. They must take the testimony; and may give their opinion to the Commissioner on the merits of the contest (which, however, is merely advisory). There are but two officers who can decide; originally, the Commissioner, and, on appeal, the Secretary of the Interior.

But, further than this, even if the Act of 1866 did confirm this selection, it does not help the plaintiff. The right of the State, or its grantee, would still be but inchoate, the title remaining in the United States until the land shall be certified over to the State by the Commissioner of the General Land Office. There is no evidence in the record that this land has been so certified over, and it is conceded by counsel for appellants that it has not.

The land in controversy had been reserved, and appropriated by the United States before the attempted selection by the State.

The tract of land in question is known as "Cape Mendocino."

On the 18th day of August, 1856, Congress, by Act, authorized and appropriated forty thousand dollars for the construction of a first-class light-house at "Cape Mendo-

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cino," i. e., upon the land described in the complaint. (11 Statutes at Large, 100.) June 20, 1860, Congress made another appropriation of eighty thousand dollars for the same purpose. (12 Statutes at Large, 36.) This was a reservation and appropriation of this land by the United States. In the *United States v. Fitzgerald*, 15 Peters, 421, it is said:

"If the Act had directed that the light-house should be built on this particular tract, according to the decision of this Court in *Wilcox v. Jackson*, 13 Peters, 498, it would have been such an appropriation within the meaning of the Act of the 29th of May, 1830, as would have deprived the defendants of their right of preëmption."

By the Court, CROCKETT, J.:

The action is ejectment, to recover from the light-house keepers the possession of the light-house erected by the United States at Cape Mendocino, together with the tract of land on which it stands. A judgment having been entered for the defendants, the plaintiff appeals on the judgment-roll, claiming that, on the findings of fact, the plaintiff is entitled to recover.

The plaintiff claims under a patent from the State of California, founded on an alleged selection by this State of the land in controversy, as a portion of the seventy-two sections donated to the State by the Act of Congress of March 3, 1853, for the use of a seminary of learning. (10 Statutes at Large, 248.)

Section twelve of the Act provides for the selection of the land "by the Governor of the State, or any person he may designate for that purpose, in legal sub-divisions of not less than a quarter-section of any of the unsold, unoccupied and unappropriated public lands therein, subject to the approval of the Secretary of the Interior, and to be disposed of as the Legislature shall direct."

On the 23d of April, 1858, the Legislature passed an Act providing for the selection and sale of these lands (Statutes 1858, p. 248); and the plaintiff claims that the pro-

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visions of the Act were complied with in the selection of this land. It appears from the findings that in June, 1860, one Broderson applied to the State Locating Agent for that district to purchase this tract; that the agent accepted the offer on condition that the location should "be made and approved by the United States;" that the Locating Agent applied to the United States Register and Receiver for that district for the land on behalf of the State, under the Act of March 3, 1853; that the Register and Receiver entertained the application, and approved the location; that the State Surveyor-General also approved the location, and thereupon the Governor issued a patent to Broderson in the usual form. The plaintiff holds this title. It does not appear from the findings that the Secretary of the Interior ever approved the selection and location; on the contrary, it appears that in June, 1866, and May, 1867, the land in controversy was reserved for light-house purposes, by order of the President.

We think the approval of the Secretary of the Interior was essential to a valid selection and location by the State; and that it was incumbent on the plaintiff to show affirmatively that he had approved it. The Act of March 3, 1853, provides in terms that the selection shall be subject to his approval, and we have no authority to dispense with it. This condition was doubtless inserted for the reason that, in the opinion of the highest officer of the Land Department, the land might be required in the future for public uses; and it was intended that he should exercise his judgment in the premises before the selection should be valid. But, however this may be, the statute is imperative that the selection shall be "subject" to his approval, and it is not shown that he has ever approved it, or indeed, that he had any knowledge of the selection until after the land was reserved by the President.

But the plaintiff contends that whatever defects, if any, existed in his title, were cured by the Act of Congress of July 23, 1866, to quiet land titles in California. (14 Statutes at Large, 218.) But it does not appear from the findings (which include all the facts in issue) that this land has ever

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been listed or certified over to the State by the Commissioner of the General Land Office; and in *Hodapp v. Sharp*, 40 Cal. 69, we held that under the Act of July 23, 1866, the title does not vest in the State until this is done.

The plaintiff in ejectment can recover only on the legal title; and on our construction of the Act of 1866, he does not acquire this under that Act until the lands are listed over to the State by the Commissioner. We are not, however, to be understood as intimating an opinion that the plaintiff would or would not have been entitled to recover, if this fact had been shown. In the view we take of the case, it is unnecessary to decide that point, or the other questions discussed by counsel.

Judgment and order affirmed. Remittitur forthwith.

[No. 4,214.]**GALEN M. FISHER v. JOHN W. PEARSON.**

COMPLAINT ON CONTRACT.—A complaint on a written contract, concerning the building of a house, in which the defendant agrees to pay all bills against the house, or litigate the same before paying them if he deemed them unjust, must aver a breach of the condition. It is not sufficient to merely aver that the defendant has failed to pay.

ISSUE.—If, in such action, the contract contains a clause by which the defendant agrees to pay all bills against the house, for which the plaintiff has not made himself personally liable, the complaint to recover such bills must aver that the plaintiff had not made himself personally liable for them.

APPEAL from the District Court, Third Judicial District, County of Alameda.

The complaint was as follows: "That heretofore, to wit: on the 7th day of November, A. D. 1872, the plaintiff and defendant, at the city of Oakland, county of Alameda and State of California, entered into a certain contract in writing, which said contract reads in the words and figures following, to wit:

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“ OAKLAND, November 7th, 1872.

“ MR. G. M. FISHER — Dear Sir: I am in receipt of your notice that Mr. Hoops has thrown up his contract with you to build your house in this city, upon which I am bondsman; and I will reply as follows, to wit:

“ The three days' notice which you have given to proceed with said contract having gone by, without his so proceeding therewith, you are at liberty to complete the same, as cheaply as possible by sub-letting, open to competition, and as per the specifications, details, drawings, and plans upon which the contract with Mr. Hoops was based.

“ I am willing, as bondsman, that you shall so go on, jointly with Doctor P. M. McLaren, my named agent for the purpose, and complete the said house as above on the following conditions:

“ First, we are to and do repudiate said contract and bond, (and all bills made thereunder) between you and said Hoops, together with all notices served concerning the completion of said house to this date, either by you on me, or by me on you, or upon said Hoops by either of us, or upon either of us by Hoops, thus closing the former transactions in any way concerning said house entire to date, as between you and myself; and cancelling all claims that you have against me to date concerning said house, but not in any way to alter my rights against said Hoops, or yours against him in consequence of his failure to complete said house as per his contract. Also the architects on said house, to wit:

“ Messrs. Ball & Day shall have nothing further to do with the house in any way hereafter, and in case of any dispute between you and my named agent, as to the completion of said house, the matter shall be referred to Mr. Wolfe, an architect of Oakland, whose decision shall be final; said house to be completed at my expense, and all *bona fide* valid bills against said house to date, made by said Hoops, and for which liens have been filed, or may hereafter be filed upon said house to be paid by me, (or litigated, as I may choose before paying them, should I deem them unjust) you paying one half the actual expenses of such litiga-

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tion, and I the other. You also to pay over to me as I may require it from time to time, the full contract price that you were to pay to said Hoops to construct said house, together with the price paid by me for any and all extras that I may put upon said house; and also you are to pay to me, as I require it, one half the actual loss or difference between the actual cost of the entire erection of said house, and the said named contract price that you were to have paid said Hoops for the construction of the same.

“It being of course understood and agreed by both you and me, that all money legally paid by you to date on said house to said Hoops by way of architect’s certificates, together with all bills actually paid by you on said house to date, and which bills were actually chargeable to said Hoops under his contract to construct said house, and for which acceptances valid liens may be filed against said house, together with all acceptances already made by you for work done or material furnished by said Hoops on said house, and which acceptances you are compelled to so pay by reason of such valid liens and for said house between this date and ten days after the completion of the same by me, shall all come out of and be deducted by you from the money hereinafter named to be paid by you to me.

“In short, I am to complete said house, and to pay the bills hereinbefore named to be paid by me, and to clear said house of all valid mechanics’ liens filed thereon for money due on its construction, either by litigation or otherwise, as I may choose to do, and you are to pay over to me all the moneys therefore hereinfore named to be paid to me as I may require it; and it is hereby agreed that you shall claim no damages against me for any actual time required to complete said house, or otherwise; and that should either party hereto violate this agreement in any way, he shall become at once due and owing the other party hereto the sum of one thousand dollars, United States gold coin, for liquidated damages, which sum may be collected by law by the other party from the party so violating the same, together with cost of collection and attorneys’ fees in the sum of one hundred and fifty dollars, United States gold coin; and said

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party so violating this agreement, does hereby waive all his rights to any and all defense at law against the other party in the enforcement of such liquidated damages, attorneys' fees, and expense of collection.

"Signed and sealed on this the day and year first above named by me.

"JNO. W. PEARSON,
"GALEN M. FISHER.

"And accepted by me on the face hereof in presence of.
WM. H. PARSONS."

And plaintiff avers that he has in all respects performed all the conditions in said contract contained to be done or performed by him. That he paid to said defendant the whole of the balance of the contract price agreed by plaintiff to be paid to said Hoops for the erection of the building referred to in said contract herein set forth, to wit: the sum of two thousand four hundred dollars in gold coin; that on the completion of said building mentioned in the foregoing contract, and in the contract with said Hoops, plaintiff and defendant had an accounting together as to the amount of deficiency remaining after having applied all the money under the original contract with said Hoops, not paid out at the date of the agreement herein set forth. That a writing showing such deficiency and the amount and persons to whom such deficiency was due, was made and signed by plaintiff and P. M. McLaren, the named agent of defendant, and which writing is as follows:

"Agreed deficiency on G. M. Fisher's house on Webster street, Oakland, as per contract between said Fisher and John W. Pearson, any errors or omissions excepted.

"SAN FRANCISCO, Dec. 17, 1872.

Chaplin, carpenter	\$112 00
Frost & K., painters	275 00
Grosso & Wilcox, hardware	40 12
Hawley & Co., (correct P. M. McLaren, agent)...	108 34
<hr/>	
Amount carried forward	\$535 46

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Amount brought forward.....	\$535 46
Heywoods & Jacobs, lumber	188 52
Redican, plasterer	60 00
“ “	138 39
Wm. Heymon, turning	85 00
Remillard, brick-mason	179 00
John Allen, laborer	19 25
Sands	8 80
Barbagaletta, hardware	6 50
	<hr/>
	\$1,220 92
By cash on hand.....	47 09
	<hr/>
	2) 1,173 83
	<hr/>
	586 91
Cash paid Redican by Fisher	60 00
	<hr/>
	\$526 91

“ It is understood that if Mr. Fisher has made himself personally liable for any of the within statement of accounts, that the whole shall be paid by him of such bills as he has made himself personally liable for.”

“ The above statement we believe to be correct.
“ G. M. FISHER,
“ P. M. MOLAREN.”

And plaintiff avers that immediately after making said statement, and writing last above set forth, he paid to said defendant, John W. Pearson, the one half of said deficiency, to wit: the sum of five hundred and eighty-six dollars and ninety-one cents in gold coin.

And plaintiff avers that said defendant has failed and refused to perform his part of said contract herein first set forth, and has violated the same; that defendant has failed and refused to pay said agreed deficiency claims set forth in the writing last set forth, or any portion or part thereof, except the claim of Chaplin, Frost & K., Mawley & Co., Redican, Grosso & Wilcox part nine dollars and seventy cents, amounting in the aggregate to the sum of five hun-

Argument for Appellant.

dred and sixty-five dollars and four cents, leaving a balance of six hundred and eight dollars and seventy-nine cents unpaid; and though often requested to pay the same by said plaintiff, yet he has refused and still refuses so to do; and though demanded, has refused to pay back to plaintiff the five hundred and eighty-six dollars and ninety-one cents paid by plaintiff to defendant as aforesaid.

Plaintiff further complaining, avers that on account of the violation of said contract first herein set forth by said defendant, plaintiff has been put to great cost and expense, and has had liens filed against his said property on account of said claims so unpaid as aforesaid, and judgments obtained against him, and his property advertised for sale; and he has been compelled to pay large sums of money in shape of costs and attorneys' fees, besides having to pay the indebtedness set forth in the writing last above herein set forth, amounting in all to the sum of seven hundred and twenty-eight dollars and seventy-nine cents, gold coin.

And plaintiff avers that by reason of defendant's violation of said agreement first herein set forth, the said defendant has become indebted to said plaintiff in the sum of one thousand dollars, gold coin of the United States, together with the sum of one hundred and fifty dollars attorneys' fees.

The defendant answered, and the Court rendered judgment for the plaintiff for the liquidated damages mentioned in the contract. The defendant appealed.

Craig & Meredith, for the Appellant.

The complaint does not set forth any breach by defendant of the contract sued on. The contract was that defendant should "pay or litigate, etc." The breach alleged is that defendant "did not pay, etc."

The complaint does not set forth a compliance by plaintiff with the contract sued on. The plaintiff was to pay the claims set forth if he had made himself personally liable; there is no allegation that he had not made himself personally liable.

Points decided.

S. F. Gilcrest, for the Respondent.

By the COURT:

The complaint is radically defective and insufficient to support the judgment.

There is no sufficient, nor indeed any, breach of the first agreement set forth in the complaint. As to the supplemental agreement, there is no averment that the plaintiff has not made himself personally liable for each of the items of account contained therein; and if he had in fact made himself personally liable therefor, he could not recover by reason of anything contained in that agreement.

Judgment reversed and cause remanded.

[No. 2,931.]

**PETER QUALE v. A. MOON AND JOHN CLARK
ET AL.**

LIEN OF SUB-CONTRACTOR.—The lien of a sub-contractor, under the Act of March 30, 1868, "for securing liens of mechanics and others," does not depend on, and is not suspended until the completion of the building.

DEFENSE OF OWNER AGAINST LIEN CLAIMED BY SUB-CONTRACTOR.—If, in an action by a sub-contractor to enforce a lien on a building, in a case where the contractor abandoned the contract before the building was completed, the owner relies for a defense on a clause in his contract with the contractor, which provides, "that should said contractor refuse or neglect to supply a sufficiency of materials, the owner shall have the power to provide materials and workmen, after three days' notice in writing being given to finish the said works, and the expense will be deducted from the amount of the contract," he must aver, in his answer, that the contractor neglected to supply a sufficiency of materials, and was notified in writing to proceed with the work in three days, or that the owner would complete the house himself.

VERDICT.—If, in such case, the owner relies on the fact that the sums he has paid the contractor before he abandoned the work, and the cost of completing the building, amounts to more than the contract price, he must aver, in his answer, that the sum paid the contractor was due when it was paid, and that the aggregate of liens sought to be foreclosed exceed the amount which was to be paid the contractor, and that the sums paid out by him after the abandonment by the contractor, were paid to complete the building according to the terms of the contract,

Statement of Facts.

CONSTITUTIONALITY OF LIEN LAW.—The Act of 1868 for securing liens of mechanics and others, does not, because it fails to give laborers other than those working on mining claims a lien, violate the provision in the constitution, "all laws of a general nature shall have a uniform operation."

ACTION TO ENFORCE MECHANICS' LIEN.—A mechanic, in an action to enforce a lien for work and material on a building, may unite a cause of action for work and material furnished a contractor, with a cause of action for work and material furnished at the request of the owner.

APPEAL from the District Court, Fourth Judicial District, City and County of San Francisco.

Action to enforce a lien on a lot and building in San Francisco. The plaintiff averred in his complaint, that the defendant, Moon, owned the lot, and, about the 22d of July, 1869, entered into a contract in writing with the defendant, Clark, by which Clark, in consideration of certain money to be paid him by Moon, agreed to erect for Moon a building on the lot. That Clark, about the 5th of August, 1869, commenced to erect the building, and on the 7th of October, 1869, made an agreement in writing with the plaintiff, by which the plaintiff was to furnish materials for and do the plastering on the building, for the sum of six hundred and fifty dollars, to be paid by Clark. That the plaintiff performed the contract on his part, and completed the plastering on the 23d of November, 1869, and the same was accepted by Moon. That Clark, on the 30th of October, 1869, paid the plaintiff three hundred and twenty-five dollars on the contract, but the balance of the sum due had not been paid. It was alleged that the building was completed December 6, 1869. There were the usual averments of the filing of the lien, etc. There were several defendants other than Moon and Clark, who, it was alleged, had furnished materials for, or performed work on the building, who appeared separately, and set up the facts out of which their respective liens grew, and asked to have them enforced. Among the number was M. W. Higgins, who, in his answer, set up a claim for furnishing lead and iron pipes for gas and water for the building, and for work on the same as a mechanic, under a contract with Clark,

Statement of Facts.

and also a separate claim for marble, slabs, and extra pipe, furnished for the building at the request of Moon, and for work as a mechanic at his request. Moon demurred to the answer of Higgins, because it contained two causes of action; one for work and material as a sub-contractor at the request of Clark, and one for the same at the request of Moon. The demurrer was overruled.

Moon, in his answer, filed March 2, 1870, admitted the contract between himself and Clark, but averred that by its terms the building was to be completed on or before the 15th day of November, 1869, and that it was not yet completed. He also admitted the contract between the plaintiff and Clark, and that but three hundred and twenty-five dollars, had been paid on it; and averred that the balance would not become due until thirty days after the completion of the building. He also averred that, before the 22d of October, 1869, he had paid to Clark, upon his contract, divers sums of money amounting to the sum of three thousand four hundred and fifty dollars and forty cents, but did not aver that the same was due to Clark when paid, nor did he allege the sum total he was to pay to Clark. He further alleged that, by the terms of his contract with Clark, it was provided that, should said contractor "refuse or neglect to supply a sufficiency of materials, the owner shall have the power to provide materials and workmen, after three days' notice in writing being given to finish the said works, and the expense will be deducted from the amount of the contract;" and that on the 12th day of November, 1869, Clark abandoned his contract, and failed and refused to procure further materials, or further proceed with the building; and that on the 16th of November following, he served notice in writing upon Clark, that "Clark having failed to complete said house within the time mentioned in the contract therefor; that said notice was and is a three days' notice to said Clark that said Moon would complete said house himself," and that Clark had not done anything further on the building, but it still remained unfinished; and that since Clark abandoned the contract, he had "paid out for work, labor and materials for, in and upon the

Argument for Respondents.

construction of said building divers large sums of money, amounting in the aggregate to a large sum of money, to wit: one thousand three hundred and fifty-seven dollars and two cents;" and that said sums of money amounted to a larger sum than the contract with Clark called for. There was no allegation that the sums paid out by Moon, after the abandonment by Clark, were paid to complete the building according to the terms of the contract with Clark. The Court sustained a demurrer to the answer of Moon. The defendants then moved for judgment on the pleadings, and the motion was granted. The defendant Moon appealed

James McCabe, for the Appellant.

Higgins avers one contract with Clark, and another with Moon, to wit: he sets forth one cause of action, upon which John Clark and Moon are both liable (if said lien law is valid), and another against Moon individually. This is manifestly a misjoinder of causes of action.

The Lien Law (Statutes of 1867-8, p. 589), gives a lien to miners and to laborers working upon mining claims, but fails to give a lien to engineers, etc., upon railroads, or to laborers in factories. It is, therefore, not uniform in its operation, and violates that clause in the Constitution which requires all laws of a general nature to have a uniform operation.

Mr. McCabe also argued that the lien law was unconstitutional, because, as he contended, Moon was compelled to pay more than his original contract price with Clark. It is in relation to this point that the Court, in its opinion says: "The other constitutional objection suggested by appellant does not arise out of the facts of the case."

John M. Burnett, for the Respondent Quale.

Parker & Roche, for Respondents C. A. Hooper & Co., and M. W. Higgins.

Leonard S. Clark, for Respondents B. and J. S. Doe and the Excelsior Mill Company.

Points decided.

By the Court, **McKINSTRY, J.:**

The demurrer to the answer of defendant Moon to plaintiff's amended complaint was properly sustained. The lien of the plaintiff did not depend on and was not suspended until the completion of the building.

The answer does not aver that the builder, having neglected "to supply a sufficiency of materials," was notified by the defendant to proceed with the works within three days, or that he (the defendant) would complete the house himself. Nor does it aver that the sum paid by the defendant to the builder, before the abandonment by him of his work and contract, was due when the same was paid; nor that the aggregate of the liens foreclosed in this action exceeds the amount which was to be paid the builder; nor that the sums by defendant paid out after the alleged abandonment by the builder were paid to complete the building according to the terms of the contract.

The Act under which this suit was brought does not violate the provision of the Constitution: "All laws of a general nature shall have a uniform operation." The other constitutional objection suggested by appellant does not arise out of the facts of this case.

There is no misjoinder of causes of action in the amended cross-complaint of defendant Higgins.

Judgment and order denying new trial affirmed. Remittitur forthwith.

Mr. Chief Justice WALLACE did not express an opinion.

[No. 3,637.]

VOLNEY E. HOWARD AND D. W. PERLEY v. SAMUEL R. THROCKMORTON, E. L. GOOLD AND JOSEPH P. THOMPSON ET AL.

SUIT FOR SPECIFIC PERFORMANCE.—Although, when an attorney contracts to perform legal services for a client in consideration of receiving a

Statement of Facts.

portion of the property about which the litigation is to be carried on, he cannot maintain an action for a specific performance while the contract remains unperformed on his part; yet, if he can show a substantial performance on his part, he is as fully entitled to maintain such action as he would be if the agreement on his part had been for the payment of money.

PRESUMPTION AS TO FINDING OF FACTS.—The presumption is that all the material issues were found in favor of the party who recovers a judgment.

ADMISSION IN ANSWER.—If a defendant in his answer admits a material allegation in a complaint, he is afterwards precluded from contesting it.

SPECIFIC PERFORMANCE OF A CONTRACT.—If a client contracts with his attorney to convey to him a portion of the property in litigation, in consideration of legal services to be rendered, the facts, that the property afterward enhances in value, and that such enhancement is, in a material degree, the result of the labor and money of the client, are no valid objection to a decree for a specific performance of the contract.

APPEAL from the District Court, Seventh Judicial District, County of Marin.

On the 7th day of August, 1855, William A. Richardson, his wife Maria A. Richardson, and others, their relatives, were the owners of a tract of land known as the Saucelito Rancho, containing four square leagues, lying in the county of Marin, and another tract known as the Albion Rancho, lying in Mendocino County, containing twenty square leagues, and some town lots in San Diego. The Marin County Rancho was heavily encumbered, and proceedings were pending for the final confirmation of both tracts, and litigation was pending and about to be commenced to enforce liens, encumbrances, etc.

The plaintiffs, Howard & Perley, were partners in the practice of law in San Francisco, and were Richardson's attorneys. They advised him to convey his property to some business man who had the capacity to manage it, in order to have the encumbrances paid off, and to save some portion of it, and selected the defendant Throckmorton as a proper person to receive the conveyance. On said day Richardson and the others conveyed to Throckmorton. The conveyance recited that it was made upon the conditions that Throckmorton should sell so much of the land as he deemed necessary to pay all debts which were a lien on the

Statement of Facts.

property, and should sell the land within three years, and pay to the grantors one fifth of all proceeds over and above what was required to pay all debts and his own expenses and expenses of litigation; or, at his option, he might convey to the grantors an undivided one fifth of what remained after the debts and expenses were all liquidated. Throckmorton was to conduct all litigation, defend all suits, etc. The plaintiffs testified that there was an understanding between them and Throckmorton, before the deed was executed, that he should employ them as his attorneys in all litigation concerning the property. On the 21st day of August following, Throckmorton and Howard & Perley entered into a contract by which Howard & Perley were to "conduct and manage the legal part of the business arising out of, and connected with, the said property," and were "to commence and conduct all suits in law or equity, which may be necessary or proper, in order to set aside or remove any of the encumbrances now existing against the said property, or any part thereof; and they also agree to defend any and all suits that may be commenced in any of the Courts of this State, or in the District or Circuit Court of the United States, in California, or appealed to the Supreme Court of the United States, by any of the parties holding encumbrances on any part of said property against said Throckmorton or said Richardson, or by any other person claiming under said Throckmorton, and all suits which may arise out of said transactions, until the final decision and settlement of the same."

"And they (H. & P.) further agree at all times to give their advise to said Throckmorton on any question that may arise concerning the said property; * * * * * and to do and perform all legal business appertaining to the duties of attorneys and counsellors, arising out of, and connected with, the said property."

Upon compliance by Howard & Perley, Throckmorton undertook to pay Howard & Perley one fifth of the net profits, after deducting all advances, all encumbrances, the expenses of litigation, etc., etc., and to transfer one fifth of the residue to Howard & Perley.

Statement of Facts.

The deed to Throckmorton was superseded by another, on the 9th day of February, 1856, in which the clause requiring Throckmorton to sell in three years, was left out, but in other respects the conditions were the same.

There was much litigation concerning the property, which lasted for many years, and several of the suits were appealed to the Supreme Court.

The plaintiffs claimed that they had fulfilled all the conditions of the contract on their part, by giving their personal attention to the litigation, and by employing defendant Goold, who was an attorney, to represent and act for them. They assigned an undivided one half of what they were to receive under the contract to Goold, in 1858, in consideration of his legal services to be thereafter rendered. In 1868 the litigation had been ended, and Throckmorton had received some four hundred thousand dollars, for sales made of portions of the Saucelito Rancho, and had paid all the debts; and there was about sixteen thousand acres of the Saucelito Rancho, and all the other land remaining unsold. Howard & Perley demanded of Throckmorton a fulfilment of the contract, which he refused. This action was then commenced for an accounting, and for a specific performance. Goold was made a defendant under an allegation that he had been asked to join as plaintiff, and had refused. Throckmorton relied principally for a defense on the alleged fact, that Howard & Perley had failed to comply with the contract, and that he had been compelled to employ other attorneys. There was no finding of facts, but the Court below decreed a specific performance, and referred the matter to a referee to take an account. Upon the coming in of the report, judgment was rendered in favor of the plaintiffs, for sixteen thousand one hundred and eleven dollars and fifty-four cents, and in favor of Goold for the same sum, and the defendant Throckmorton was ordered to convey to Howard & Perley an undivided two twenty-fifths of the land unsold, and to Goold the same quantity. The defendant Throckmorton appealed. The other defendants were made such under allegations that they had bought portions of

Argument for Appellants.

the Saucelito Rancho, and given notes for the same, and mortgages to secure the notes, which were in Throckmorton's hands.

The other facts are stated in the opinion.

W. H. Patterson, for Appellants.

The contract was for personal professional services. Throckmorton could not have compelled a specific performance; therefore it cannot be adjudged against him. (*Cooper v. Pena*, 21 Cal. 403; *Owen v. Frink*, 24 Cal. approving; *Cooper v. Pena*; *Vassault v. Edwards*, 43 Cal.; *Bayard v. McLane*, 3 Harrington, Del. 139; *Duval v. Meyers*, 2 Maryland, Chy. 401; Fry on S. P. Secs. 56, 58 and 59.)

Alexander Campbell, also for Appellants.

The authorities, both in England and the United States, and also in the State of California, fully establish the general rule, that to warrant a decree for specific performance, the remedy must be mutual; i. e., the contract must have been such originally, that either party would be entitled to a decree for a specific performance, on a failure to perform by the other; and it is equally well established that a contract for personal services, involving the exercise of skill, cannot be specifically enforced against the party agreeing to render the services. (Fry on Spec. Per. 68.)

This rule, like all others, is subject to occasional exceptions. Among them is mentioned the case where there has been a strict performance on one side and a failure to perform on the other; and where, from the nature of the contract or the circumstances of the case, the party injured could have no adequate relief at law.

But in all these instances the complainant must be able to show that he has, to the fullest extent, and in the best possible faith, discharged all the obligations which devolved upon him. If he has failed in any material respect, he cannot invoke the aid of a Court of equity to enforce specific performance by the other side.

The authorities upon these points are fully set forth in the original brief in this case, prepared by Mr. Patterson.

Argument for Respondent.

We may add, however: First—that in no case will part performance enable the Court to intervene where it has no jurisdiction of the original subject-matter of the contract. (Fry on Spec. Per. p. 67; *Whitney v. New Haven*, 23 Conn. 624.) Second—Where the acts alleged as part performance are proper to be brought before a jury, and can be answered in damages, non-performance of the contract does not constitute that fraud which is the origin of the Court's jurisdiction in cases of part performance in this respect as well as when treated as an exception to the Statute of Frauds. (Fry, 68; *South Wales Railway v. Wythes*, 1 K. & J. 186; Fry, p. 262, Sec. 405.)

Williston v. Williston (41 Barb. 635) was a case where the defendant had agreed to convey a lot, on the condition that the plaintiff would keep up certain fences. The plaintiff did so for twenty years. The defendant refusing to convey, the Court enforced specific performance, because the refusal operated under the circumstances of that case as a fraud on the plaintiff.

V. E. Howard, in pro. per., for Respondent.

The first objection to a specific performance interposed by the defendant is the want of mutuality. The objection is not set up in the answer as a defense, but raised on the argument.

As it cannot be urged to the contract, we presume it is intended to assert, that, there ought not to be a specific performance, because there is a want of mutuality in the remedy, as the plaintiffs could not have been compelled to render specific performance of the personal services. This objection would come with some force, if this was a bill to compel the reception or rendition of personal services, where nothing had been done under the contract.

The true rule in such cases was stated by Lord Redesdale in *Laurenson v. Butler*, 1 Schoales and Le Froy, p. 13, that: "A Court of equity ought not to decree a specific performance in a case where nothing has been done in pursuance of the agreement, except when both parties had by

Argument for Respondent.

the agreement a right to compel a specific performance according to the advantage which it might be supposed that they were to derive from it."

This distinction is commented upon with approbation in *Hall v. Center*, 40 Cal. It is also said in that case, that the rule is far from being universal. In the late case of *Salisbury v. Hatcher*, 2 Young and Collier, p. 54, the Vice Chancellor held: "It is contrary to principle and authority to say that perfect mutuality is requisite in order to call a Court of equity into action.

"When no legal invalidity effects the contract, the enforcement of it in this Court is a matter of judicial discretion."

It is not questioned that complete performance takes the case out of the rule. It is so said in *Cooper v. Pena*, 21 Cal.

In the case of the *Des Moines R. R. Co. v. Graff* (27 Iowa, p. 99), which was a case in equity to compel parties to pay a subscription to a railroad, on condition that it ran through a certain place, where there was no obligation on the company to construct it; the Court said: "It is plain law, if A. promised to pay B. a sum of money if he will do a particular act, and B. does the act, A. is liable, though B. did not, at the time of the promise, engage to do the act; for upon the performance of the condition by the promisee, the contract is clothed with a valid consideration, which relates back, and the promise at once becomes obligatory. (*Goodpaster v. Porter*, 11 Iowa, 166.) Plaintiff alleges performance on his part; and thus consideration is shown, and the objection of a want of mutuality removed." The rule is the same as to personal services by an attorney. (*Allcorn v. Butler*, 9 Texas, 56.)

It is equally well settled, that part performance removes the objection, if it is of a substantial part. The part performance of a contract may give the Court jurisdiction where it would not otherwise have it. (Fry on Specific Performance, pp. 67, 99, 54; 2 Story's Eq. Secs. 759, 774.) When the parties cannot be placed in the same situation, owing to the acts of one of the parties, it is considered that

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the contract is complete in equity. (*Willitson v. Willitson*, 41 Barb. 635, 520.) After thirteen years' services under a contract, it is too late to set up the want of mutuality, because it would be fraud. (41 Barb. 635.)

Mutuality may be waived by the subsequent conduct of the person against whom the contract could not originally have been enforced. (Fry, p. 201, Secs. 293, 297.) It has been waived in this case by the reception of the services for a series of years.

J. P. Hoge, also for the Respondents.

By the Court, RHODES, J.:

The Court found that the plaintiffs and Goold had duly performed the contract of August 21, 1855, made between the plaintiffs and Throckmorton. From the pleadings and judgment the implication is that the Court also found that each of the plaintiffs assigned to Goold one half of the compensation to which he was entitled under that contract, on condition that he (Goold) would render professional services as specified in the contract; that Throckmorton had notice of such assignment, and accepted and availed himself of the professional services of Goold. There was evidence to sustain those findings.

There was not an exact performance of the contract by the plaintiffs and Goold — some services about the matter having been performed by others; but within the doctrine of *Ballard v. Carr*, ante p. 74, there was a substantial performance.

While it is true, as a general proposition, that a party who has contracted to perform services of the character mentioned in the contract in this case cannot maintain an action for specific performance while the contract remains unperformed on his part, yet if he can show a substantial performance on his part, he is as fully entitled to maintain such action as he would be if the agreement on his part had been for the payment of money. (See *Ballard v. Carr*, *supra*.)

Points decided.

It is testified by Throckmorton that at a certain stage in the business he regarded the contract of August 21, 1855, as abandoned, but it is by no means clear that Howard & Perley so intended. The finding was against the abandonment, and we see no grounds upon which the finding can be disturbed.

The defendant, Throckmorton, is precluded by the pleadings from raising the point that litigation in respect to the Saucelito Rancho was pending at the commencement of the action, the answer having admitted that all the litigation in respect to the property mentioned in the agreement had ended and terminated.

The fact that the property has greatly enhanced in value since the contract between Throckmorton and Howard & Perley was made, and that such enhancement was in a material degree the result of the labor and money of Throckmorton, presents no valid objection to the decree for specific performance. Howard & Perley did not undertake to perform the labor which it is alleged was performed by Throckmorton, nor to furnish money to be used for the purpose of removing the encumbrances on the property, or for any other purpose in respect to it. Besides this, the answer contains no averment that Throckmorton performed any services or expended any money upon, or in respect to, the property other or different from what was contemplated by the parties to the contract.

Judgment and order affirmed. Remittitur forthwith.

Mr. Justice McKINSTRY did not express an opinion.

[No. 3,482.]

MARY POLACK v. THE TRUSTEES OF THE SAN FRANCISCO ORPHAN ASYLUM.

POWER OF LEGISLATURE OVER STREETS.—The Legislature has power to vacate a street in a city; and it may delegate such power to the municipal authorities of a city, and after such power has been delegated to

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the municipal authorities, the Legislature may revoke it in part, as well as in whole, or without any express revocation, may itself exercise it. **IDEM.**—The municipal authorities of a city cannot vacate a street without the consent of the Legislature.

IDEM.—The Legislature may vacate a portion of a street, even if a person owns property fronting on another portion of the street which will incidentally be injured thereby.

APPEAL from the District Court, Fifteenth Judicial District, City and County of San Francisco.

Market street is a wide street leading through the city of San Francisco, over which there is a large amount of travel, and Waller street extends from Market street in a westerly direction towards the Pacific ocean. The plaintiff owned lots on each side of Waller street, a short distance from Market street; and between Market street and the plaintiff's lots, the defendant owned two blocks of land, through which Waller street passed. The plaintiff recovered judgment and the defendant appealed.

The other facts are stated in the opinion.

W. H. L. Barnes and Jackson Temple, for the Appellant, cited *San Francisco v. Canavan*, 42 Cal. 541; *Payne v. Treadwell*, 16 Cal. 233; *People v. Ferguson*, 36 Cal. 595; *Smith v. Boston*, 7 Cushing, 254; *Castle v. Berkshire*, 11 Gray, 26, and *Radcliffe v. The Mayor, etc.*, 4 N. Y. 195.

E. L. B. Brooks, for the Respondent, argued that the plaintiff, by his ownership of the lots, had acquired a vested right to have Waller street kept open; and cited *Sherman v. Buick*, 32 Cal. 241, and also argued that the closing of the street was a nuisance, and cited section twenty-four of the Practice Act, which defines a nuisance. He also cited *Breed v. Cunningham*, 2 Cal. 361; *People v. Beaubien*, 2 Douglas, 256; *McConnell v. The Trustees of the Town of Lexington*, 12 Wheaton, 582, and *City of Cincinnati v. White*, 6 Peters, 431.

By the Court, RHODES, J.:

In 1865, the Board of Supervisors of the City and County

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of San Francisco passed a resolution "that the Protestant Orphan Asylum Society have the use of Waller street, between Laguna and Buchanan streets, and that the same remain closed during the pleasure of this Board." On the 23d of January, 1866, an Act was passed by which the Board of Supervisors were authorized to close up Waller street, between Laguna and Buchanan streets, and dedicate the same to the use of the Protestant Orphan Asylum, (Stats. 1865-5, p. 37). A further Act was passed March 5, 1868, (Stats. 1867-8, p. 95), the first section of which is as follows: "The block of land in the City and County of San Francisco, bounded by Kate street, Buchanan street, Laguna street, and Haight street, and every part thereof, is confirmed to the free use of its present occupants, to wit: the Protestant Orphan Asylum of the City and County of San Francisco; and no street shall be opened through any part of said block of land without the consent of said Asylum." The block of land therein described includes that portion of Waller street which lies between Laguna and Buchanan streets. The defendant inclosed the whole block, thereby closing up the portion of Waller street above mentioned. The plaintiff owns several blocks and lots of land fronting on Waller street, and the defendant's inclosure prevents her from passing from Market street continuously along Waller street to her property. The purpose of this action is to cause the defendant to remove its fences, etc., from Waller street, claiming that they constitute a nuisance. The answer sets up the above mentioned resolution and statutes, and the demurrer thereto was sustained.

That the Legislature possesses competent power to vacate a street in a city; that the Legislature may delegate or commit such power to the municipal authorities of the city; that its exercise by the municipal authorities is dependent on the will and subject to the control of the Legislature; and that after such power has thus been committed to the municipal authorities, the Legislature may revoke it in part as well as in whole, or, without an express revocation, may itself exercise it in any particular instance, are propositions about which there can be no controversy in this State. The

Points decided.

plenary power of the Legislature over the whole domain of streets, is well illustrated by the decisions of this Court, in the litigation respecting Kearny, Second and Beale Streets, in the city of San Francisco.

The only remaining question involving the validity of the statutes presented in this case — and in our opinion it does not amount to a serious question — is whether it is a condition to the exercise by the Legislature of its power to vacate a portion of a street, that no person owning property fronting on another portion of the street, will incidentally be injured by such action. There is no provision of the Constitution which imposes that condition or limitation on the exercise of such power, and no principle of law is suggested which will lead to that result.

Judgment reversed and cause remanded, with directions to overrule the demurrer to the answer. Remittitur forthwith.

Mr. Justice McKINSTRY concurred specially in the judgment.

Mr. Chief Justice WALLACE did not express an opinion.

[No. 3,699.]

THE CITY AND COUNTY OF SAN FRANCISCO v. THE SPRING VALLEY WATER WORKS.

FORMATION AND POWERS OF CORPORATIONS.—Corporations in this State, except for municipal purposes, must be formed under general laws, and can exercise no powers except such as are conferred by these general laws. The Legislature cannot confer on such corporations any powers or grant them any privileges, by special Act.

AN ACT GRANTING POWERS TO INDIVIDUALS WHEN THEY INCORPORATE.—An Act which grants to individuals and their assigns certain powers and privileges, and then provides that the Act shall not take effect unless the persons to whom the grant is made shall, within a certain time, organize themselves into a corporation under existing laws, is a grant, not to the individuals as persons, but to the corporation when formed.

IDEM.—Such Act is an attempt of the Legislature to confer powers and privileges upon a corporation by special Act.

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IDEM.—When such persons organize themselves into a corporation under the general laws, the corporation possesses no powers or privileges except such as are conferred by general laws.

CORPORATIONS TO SUPPLY A CITY WITH WATER.—Private corporations, to supply a city with water, cannot be created by special Act, nor can the power to supply a city with water be conferred on a private corporation by special Act.

STARE DECISIS.—Even if property rights have grown up under an erroneous decision with regard to the construction of a clause in the Constitution, it is better that inconvenience should be submitted to, rather than such decision should stand, and a valuable provision in the fundamental law be obliterated.

GENERAL AND SPECIAL ACTS.—An Act which purports on its face to be, and is in fact, a special Act, cannot be converted into a general Act, by a declaration of the Legislature in another Act, that it shall be considered a general Act.

PURCHASE BY ONE CORPORATION OF PROPERTY OF ANOTHER.—If a corporation contracts with a city to supply it with pure fresh water for all purposes, except the sprinkling of streets, and the contract contains a clause, that if any other corporation receives permission to furnish the city with water on more favorable terms, the same terms shall be extended to the corporation contracting; and if another corporation is granted more favorable terms, and then purchases the rights and franchises of the old corporation, it does not thereby become bound by the contract, but may supply the city on the terms it enjoyed before the purchase.

GRANT OF EASEMENT IN STREETS.—The State has no proprietary interest in the streets of a city dedicated to public use; and when it grants to a private corporation an easement over the streets, not common to the public at large, it merely grants, in its sovereign capacity, a franchise, and not any proprietary interest in the streets.

FEE IN STREETS.—As a general rule the fee of the streets in a city, dedicated to public use, is in the owners of the adjoining lands, on each side, to the centre of the street.

GRANT OF EASEMENT IN A STREET.—A grant of an easement in a street, made by the Legislature to a corporation, is purely a grant of corporate power, and therefore cannot be made to a private corporation by special Act.

ACT UNCONSTITUTIONAL IN PART AND GOOD IN PART.—When a portion of an Act is constitutional, and another portion is unconstitutional, and the two are so inseparably blended together, as to make it clear that either clause would not have been enacted without the other, the whole act is void.

APPEAL from the District Court, Fifteenth Judicial District, City and County of San Francisco.

On the 15th day of June, 1857, a corporation, called the San Francisco Water Works, was formed, under an Act

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entitled "an Act to provide for the formation of corporations for certain purposes," passed April 14, 1853, as amended by an Act, approved April 30, 1855. This corporation introduced pure, fresh water into the City and County of San Francisco, in the year 1858. On the 23d of April, 1858, the Legislature passed the following Act:

"An Act to authorize George H. Ensign and others, owners of the Spring Valley Water Works, to lay down water-pipes in the public streets of the City and County of San Francisco.

"The People of the State of California, represented in Senate and Assembly, do enact as follows:

"Section 1. The said George H. Ensign and his associates and their assigns shall have the right, and the same is hereby granted to them and their assigns, to lay down distributing iron water-pipes in any of the public streets, ways or alleys of the City and County of San Francisco; *provided*, said pipes shall be so laid down as not to interfere with or obstruct any gas or water-pipes of any other parties, laid down by authority of law, for the purpose of introducing and furnishing fresh water for the supply of the inhabitants of said City and County of San Francisco; *provided*, that to the extent of three thousand running feet of said pipes be laid down within one year from and after the passage of this Act, and water furnished therefrom to such citizens along the line, street or streets where said iron pipes shall be laid down as may elect to take the same and the balance of said iron pipes to be laid down as soon thereafter as practicable.

"Sec. 2. Said streets or ways in which said iron pipes may be laid, to be placed in the same good order and condition, by said Ensign and his associates or assigns, as the same were before said pipes were laid down, at his or their cost and charge, and under the supervision of the Superintendent of Streets and Highways, and to his satisfaction.

"Sec. 3. The Chief Engineer of the Fire Department, under the direction of the Board of Supervisors of said City and County of San Francisco, shall have the right to

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tap any pipes so laid down, and connect hydrants therewith, for the extinguishment of any fire or fires, during the pendency of the same, free of charge to the full capacity of the said water-works, up to, and until such time as water shall be introduced into said city and county by some other person or persons; thereafter said Ensign and his associates or their assigns shall furnish for fire and other municipal uses their quota or proportion of whatever water may be produced by them, or may be introduced by any other person or persons.

“Sec. 4. The rate or price to be charged for water, with the exception mentioned in section three of this Act, shall be fixed by five commissioners, two of whom shall be appointed by the Board of Supervisors, and two by the parties named in section one of this Act; and they shall choose a fifth, and the rates agreed upon and fixed by a majority of said commissioners shall be the rates charged and received; *provided*, that the rates so established shall not be so low as to yield less than twenty per cent. per annum on the actual capital invested in said works. And whenever the said City and County of San Francisco shall become the owner of any other works for the supply of the said city with fresh water, from any source west or south of the charter line of 1851, then the said City and County may also purchase all the works, appurtenances and franchises belonging to said grantees herein, or their assigns, as provided in section five; and if the said City and County shall not elect to purchase, as provided in this section, then the Board of Supervisors, if not otherwise provided for by law, may fix the rates for water, but shall not fix the rates for water supplied by the grantees herein, below the rates charged by the City and County for water delivered from the works of said City and County.

“Sec. 5. The City and County shall have the right, after the expiration of twenty years from the passage of this Act, on giving six months' notice of their intention so to do, to purchase all the works and franchises hereby granted belonging to said Ensign, his associates or assigns, which may be in use for the purpose of supplying water to the

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people of said City, at their true value, to be determined by a Board of Commissioners, to consist of four persons, who shall be civil engineers, two to be designated by the then corporate authorities of said City and County, and two by owners of said water-works and property; and, in the event of their disagreement, the said commissioners shall have the right to select a fifth commissioner, and the decision of a majority of said Board shall be final.

“Sec. 6. That privileges herein granted to said parties, named in section one of this Act, shall be limited to a period of thirty years.

“Sec. 7. Nothing in this Act shall be construed so as to interfere with any existing rights of either the Mountain Lake or San Francisco City Water Works Companies.

“Sec. 8. This Act shall not take effect unless the parties named in section one shall, within sixty days after its passage, duly organize themselves in conformity with the existing laws regulating corporations, now in force in this State.

“Sec. 9. All laws and parts of laws inconsistent with any of the provisions of this Act are hereby declared to be inoperative, so far as provision is otherwise made by this Act.”

Said Ensign and his associates soon after formed a corporation under the name of “The Spring Valley Water Works;” and also introduced water into the City. On the 11th of April, 1859, the following amendment was passed:

“An Act to amend an Act entitled ‘An Act to authorize George H. Ensign and others, owners of the Spring Valley Water Works, to lay down water-pipes in the public streets of the City and County of San Francisco,’ passed April 23d, 1858.

“The People of the State of California, represented in Senate and Assembly, do enact as follows:

“Section 1. Section one of said Act is hereby amended so as to read as follows:

“Section 1. The said George H. Ensign and his associates and their assigns shall have the right, and the same is here-

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by granted to them and their assigns, to lay down distributing iron water-pipes in any of the public streets, ways or alleys of the City and County of San Francisco; *provided*, said pipes shall be so laid as not to interfere with or obstruct any gas or water-pipes of any other parties, laid down by authority of law, for the purpose of introducing and furnishing fresh water for the supply of the inhabitants of said City and County of San Francisco; *provided*, that to the extent of three thousand running feet of said pipes be laid down within two years from and after the passage of this Act, and water furnished therefrom to such citizens along the line, street or streets where said iron pipes shall be laid down, as may elect to take the same; and the balance of said iron pipes to be laid down as soon thereafter as practicable.

“Section 2. Nothing herein contained, or contained in the Act passed April 23, 1858, shall in any manner inure to or be so construed as to affect any rights or privileges heretofore granted to either the Mountain Lake Water Company or the San Francisco City Water Works Company.”

On the 29th of August, 1859, the Board of Supervisors of the City and County of San Francisco passed the following ordinance:

“Order No. 172, amendatory to Order No. 46, and repealing Order No. 65 and Order No. 92, in relation to the San Francisco City Water Works.

“The People of the City and County of San Francisco do ordain as follows:

“Section 1. Section one of Order No. 46 is hereby amended so as to read as follows:

“Section 1. The San Francisco City Water Works, a company duly incorporated according to the laws of this State, and their successors and assigns, shall be allowed to introduce pure fresh water for fire, municipal and other purposes into the City and County of San Francisco, through any lands claimed as belonging to the City and County of San Francisco, and to conduct water from a dam to be con-

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structed near the mouth of "Lobos Creek," so-called, by means of a suitable aqueduct of sufficient capacity to carry all the water of said stream, commencing at a point near the mouth of said creek, thence following, along the shore of the Bay, to some suitable point at North Beach, near the foot of Van Ness Avenue, at or near which point the said Company shall build a reservoir of not less than fifty thousand gallons capacity, and the said work shall be forfeited to the City and County of San Francisco, if not completed as specified in this section, on or before the 1st day of January, 1860, unless the progress of the work be suspended by law, in which case an additional time shall be allowed to the Company equal to the period during which the progress of the work may have been suspended, as aforesaid; *provided*, said Company shall use all due diligence in relieving themselves from all such legal impediments."

The following is section four of Order No. 46:

"The said City and County, under the direction of the Board of Supervisors, shall be entitled to the free use of the water so introduced, for the purpose of extinguishing fires, and for the supply of all hydrants, fire-plugs, pumps, and cisterns, and for all the public purposes of said City and County, except for sprinkling the streets; and the City and County shall have the right, under the direction of the Board of Supervisors, to tap the pipes and connect the same with hydrants, fire-plugs, cisterns, and other public works, at such places as they may deem proper."

The following is section eight of Order No. 46. This order was passed August 3, 1857.

"Section 8. It is hereby provided that should any other company, person or persons receive permission to introduce water for the purpose of supplying the City and County therewith, no more favorable terms shall be granted to such company or persons than to the company authorized under this order, without extending the same terms to the San Francisco Water Works."

Ordinance number one hundred and seventy-two was ratified and confirmed by an Act of the Legislature, ap-

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proved April 12, 1860. On the 12th of April, 1863, the following Act was passed.

An Act to extend the rights and privileges of the San Francisco City Water Works. Approved April 8, 1863.

“The people of the State of California, represented in Senate and Assembly, do enact as follows:

“Section 1. In accordance with the recommendation of the Board of Supervisors of the City and County of San Francisco, expressed in resolution number twenty-three hundred and twenty-four, passed January 5, 1863, and approved January 6, 1863, in relation to the San Francisco City Water Works, the said company are hereby relieved and discharged from any and all obligations whereby it has agreed to pay the said City and County of San Francisco five per cent. of its gross earnings.

“Section 2. It is hereby provided, that should any other company, person or persons, excepting the City and County of San Francisco, receive permission to introduce water for the purpose of supplying the said City and County therewith, no more favorable terms shall be granted to such company, person or persons, than are now enjoyed by the San Francisco City Water Works, without extending the same to the latter company.

“Section 3. It is hereby provided that any rights, privileges or immunities now enjoyed by the Spring Valley Water Works, by virtue of an Act, entitled ‘An Act to authorize George H. Ensign and others (owners of the Spring Valley Water Works,) to lay down water-pipes in the public streets of the City and County of San Francisco,’ approved April 23, 1858, which are more favorable than the terms heretofore granted to the San Francisco City Water Works, shall be held and enjoyed by the said company.

“Section 4. This Act shall take effect from and after its passage.”

On the 13th day of February, 1865, the defendant became the assignee of the franchises and property of the San Francisco City Water Works, and since has been the only

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corporation engaged in bringing fresh water into the city. One of the public squares in the city is called Portsmouth Square, and the city had been in the habit of tapping the mains of the defendant and obtaining water with which this square was irrigated. In the latter part of 1868, the defendant notified the city authorities that it should prevent the city from taking water from its water-works for any public or municipal purpose, except for the extinguishment of fires, unless the city paid, or made arrangement for paying for the water taken, other than for the extinguishment of fires. This action was brought in March, 1869, to restrain the defendant by injunction from carrying out its threat. This is the second appeal. The report of the case on the former appeal is found in the 39 Cal. p. 473. Counsel stipulated to waive the question of its being a proper case for an injunction. The Court below rendered judgment for the defendant, and the plaintiff appealed.

The other facts are stated in the opinion.

W. C. Burnett and John F. Swift, for the Appellant.

To make the argument perfect that the Ensign Act is unconstitutional, it is necessary that there should be but one thing known to the law as a franchise, namely, the privilege of being a corporation. On the contrary, there are many other franchises known to the law, and fresh ones are being created by statute constantly, as the growing and changing exigencies of society require them. The invention of telegraphy, the introduction of railroads, gas-light, etc., have materially added to the number of privileges that may be designated as franchises.

To be a corporation was only one among the many forms of that kind of property known to the common law. True, it is a franchise for a number of persons to be incorporated, and subsist as a body politic, with a power to maintain perpetual succession, and do other corporate acts; and it is true that each individual member of such corporation is said to have a "franchise," or freedom.

This thing called a corporation is the franchise that our

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constitution declares shall be formed under general laws, and shall not be created by special act.

But there are a vast number of franchises, besides that of being a corporation, known to the common law; nor is a franchise, in its nature, limited to such privileges as have before existed, for new ones may be created, and are being constantly created.

In England a franchise has been defined as a royal privilege, a branch of the crown prerogative, subsisting in the hands of the subject. Gifts of waifs, estrays, wrecks, treasure-trove, royal fish, and forfeiture, all of which are the prerogatives of the crown, are franchises. The rights of forest, park, chase, warren, and fishery, are also franchises, no subject being entitled so to apply his property for his own convenience.

A county palatine is the highest species of franchise, as within it, the earl, constable, or other chief officer, may exercise without control the highest functions of the sovereign. And as the crown may thus erect an entire county into an independent jurisdiction, so it may create a liberty or bailiwick independent of the sheriff of the county. This, then, is a franchise. The right to hold a fair, or market, or to establish a ferry, and to levy tolls thereon, are also each a franchise. So much for the common law.

Franchises are property, and fall within that classification of property known to the law as incorporeal hereditaments. In this State franchises can only be granted by the Legislature. But they may be granted to any individual capable of holding property, and either by special act, save in the case of becoming a corporation, or under and by virtue of general laws applying to all. They may be granted directly by the Legislature to a corporation in existence, or to one or more individuals; and when vested in an individual, may be granted or conveyed either to another individual, or to any corporation authorized by law to hold such property, and when so conveyed they may be exercised by the grantee.

What was in the mind of the Constitution makers, when they enacted that corporations should only be created

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under general laws, is not quite clear. Probably they individually intended to prevent the grant of charters of incorporation, combined with other special privileges, all in the same act, such as banking corporations, insurance corporations with special banking privileges, and land speculating corporations with special rights deemed dangerous to the public weal, which about that time had led to corruption and other abuses in the Atlantic States. But whatever the individual members of the constitutional convention were driving at, it is certain that when they got together they only used "apt words" to prevent the creation by special act, of that one franchise, of being a corporation, and no other. All other franchises were left to the discretion of the Legislature. And for nearly a quarter of a century they have been granted without hesitation, and for all purposes save that one alone of being a body politic and corporate, and the legality of these grants of franchises has never been questioned. The telegraph and railroad companies are constantly receiving special grants of franchises; so with plank-road companies, and ferry companies, and bridge companies.

Having once formed as corporations under the general laws, enacted for that purpose as the Constitution provides, they are ready to receive, and in law capable of receiving, holding, and exercising, grants of franchises, the same as of lands, goods, money, or any other species of property.

Take the case of the ordinary horse railroads, now so universal in this State.

These organizations begin by forming as corporations under the general laws, the object or purposes being stated in the deed of incorporation, to construct and operate horse railroads in this State. By this proceeding, the associated projectors obtain the franchise of being a corporation. This done, they are ready to commence business. But before they can successfully prosecute the work, they must acquire more or less property of various kinds, real and personal, corporeal and incorporeal. They must have real estate, such as of land for stables. They must have personal property in the way of horses, harness and cars. They

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must have incorporated property in the character of rights of way for laying down and operating their tracks, and in many cases, they have a distinct franchise in the right to condemn private property for the purposes of the road, and also a franchise to levy and collect tolls.

Ferry companies and plank-road companies, and bridge companies, and wharf companies, are formed in precisely the same way. They are first organized into corporations under the general law, as the Constitution provides, and then being capable of taking and holding property, the franchises of condemning property sometimes, when necessary, and always the franchises of levying and collecting tolls are granted to them; or, as is often the case, having been already granted to an individual, are conveyed to them by deed, so that they can prosecute their business successfully.

The case of Ensign and his associates is strictly like the foregoing. They desired to introduce water into San Francisco, and in order to do so profitably, wanted various franchises and privileges of an incorporeal nature, such as ways, easements and riparian rights, some of which could be obtained by virtue of general laws only, and others which required special legislative grants. There was a general law in existence passed the day before the Ensign Act, permitting the formation of corporations for introducing water into cities. So far as the franchise of being a corporation was concerned, in consequence of a peculiar provision of our Constitution, that could only be obtained under general laws. But the other franchises required, and especially the right to levy and collect tolls, or rates, were within the control of the Legislature. The provision on this point in the general law was not satisfactory, because it placed the regulation of the rates which were to provide for profit to the promoters, under the control of a board of five Commissioners, two of whom were to be appointed by the city authorities, and a third substantially with the Sheriff, so that a majority of the board might be hostile to the company, and so might make the business a losing affair.

For it must always be borne in mind that in the general

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law there was no provision, requiring the "water rates" to bear any relation to the amount of capital invested.

Such being the condition of affairs, they naturally sought the aid of a special law, and obtained it in the Ensign Act. By this Act there is no attempt at a grant of the franchise of being a corporation. On the contrary, the Legislature, recognizing its incapacity to specially create and grant that franchise by special Act, turned them around, in express terms (see section 8 of the "Ensign Act,") to the general laws, to acquire it, and to qualify themselves for holding and exercising the distinctive and peculiar "franchise," of levying and collecting "water rates," and of fixing those rates so that twenty per cent. profit could be obtained on the capital to be invested.

The Ensign Act is therefore not unconstitutional, as it does not form or create a corporation in any sense.

But if it did, can the defendant, after organizing with an express recognition of its requirements, and after having obtained, and for fifteen years enjoyed the advantages therein granted — privileges far superior to those possessed by any other company — when now called upon to perform its part of the contract, and after admitting, and even asserting it as a right, in the pleadings, and all the way through the suit up to this point, that it holds under and by virtue of the Ensign Act, now, on the second visit to this Court, be allowed to avail itself of such a plea? Can it plead its own incapacity in order to escape its duties? Would not such a defense be a fraud upon the public?

If this act is unconstitutional, and the defendant has been in the position of an usurper and wrong-doer all of these years, can it be allowed at this late day, or at any day, to take advantage of its own wrong?

The Constitution, in section thirty-seven, article four, imposes a duty upon the Legislature. It provides for the organization of cities, towns and incorporated villages; that is to say, it provides for the formation of municipal corporations.

Section thirty-one of article four, contains two clauses, each framed for a distinctive and specific purpose. The

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first to prevent an evil then prevalent in the new States of the south and west, by which corporations had been clothed generally by underhanded, and often by corrupt legislation, with important special and oppressive privileges, and perhaps to prevent the time of the Legislature from being consumed in passing special bills.

The second clause was designed to overcome the doctrine laid down in the Dartmouth College case.

The constitutional inhibition being a restriction upon the State legislative power, it follows that but for the first clause, the Legislature could create any corporation, either by general or special act, at its pleasure. A "municipal corporation," being a mere branch of the government, never fell within the Dartmouth College doctrine, and therefore could be repealed or modified at any time. But the first clause does not use the words "municipal corporation," but says corporations formed for "municipal purposes." Does that mean city, town or village charters merely, viz: strict municipal corporations, or does it foresee and provide for the possibility that the Legislature in its wisdom might determine to create corporations for "municipal purposes," to be composed of and managed by private individuals as auxiliary to, and in aid of the strict municipal corporations provided for, and commanded in section thirty-seven, such as gas companies, water companies, and the like? If not, then why provide for the formation of municipal corporations in section thirty-seven? Why designate the corporations excepted from the operations of the first clause of section thirty-one, corporations for municipal purposes, instead of the well-known and established term of municipal corporations?

And, lastly: and to this I call the special attention of the Court. Why provide, as is done in the second clause of section thirty-one, that the special Acts passed pursuant to that section shall be subject to alteration or repeal? That the general Acts would require a special constitutional reservation to overcome the rule in the college case, is true. But if the corporations to be created by special Act for municipal purposes were mere municipal corporations,

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organizing cities, towns and villages, then the reservation of the power to repeal and alter them was wholly useless and unnecessary.

Charles N. Fox and A. Campbell, Sr., for the Respondent.

S. M. Wilson and J. P. Hoge, also for the Respondent.

What does the Constitution mean by the language, that "corporations may be formed under general laws, but shall not be created by special Act?" It certainly did not refer to mode and manner, merely, of legislation on the subject. It had a deeper meaning, a more profound intention, a much sounder policy. It certainly had in view the powers, privileges, franchises and immunities of corporations; and none of these were left to special legislation, but were required to be given, controlled and limited by the general laws on the subject. The corporation itself is a franchise, and is defined by Mr. Justice BLACKSTONE to be a franchise. He says it is "a franchise for a number of persons to be incorporated and exist as a body politic, with a power to maintain perpetual succession, and to do corporate acts, and each individual of such corporation is also said to have a franchise, or freedom." (2 Bl. Com. 37; see also *Dartmouth College v. Woodward*, 4 Wheat. 657.)

If these corporate powers be, then, franchises, we must look to the general law for all the franchises any corporation can enjoy. If it does not enjoy them under the general law, under what law does it hold them? The extent of the franchises of a corporation is to be determined by the charter. (*Auburn and Cato Plank Road Co. v. Douglass*, 9 N. Y. R. 451.)

Mr. Bouvier, in his Law Dictionary (Word Franchise), says in regard to franchises, "in the United States they are usually held by corporations created for the purpose, and can be held only under legislative grants." He cites a large number of cases. Apply to this the language of the Constitution of California prohibiting special acts and requiring all corporations to be formed under general laws, and the result seems plain—that the general law must be

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regarded alone in determining the franchises which may be enjoyed by a corporation, and that it can have none but what the general law gives.

These corporate franchises were held, in the great Dartmouth College case cited, to be inviolable, and that they were protected by the Constitution of the United States as contracts. For this reason, also, our Constitution prohibited special acts, and made all the general laws liable to alteration or repeal at the will of the Legislature. The power to alter or amend is limited to the general laws and the special acts relating to municipalities. If any special act can give powers and privileges to a particular corporation, it follows, within the principles of the Dartmouth College case, that a contract results, which, under the Constitution of the United States, is inviolable. There is, then, but one rule of safety under the Constitution of the State, and one mode alone of maintaining its manifest policy; and that is to confine all corporations to the general law under which they are formed, and denying them any powers, privileges or franchises derived from any special law.

The Ensign Act seems to be an ingenious attempt to evade the Constitution—an attempt to comply with the letter, but a design to accomplish what its spirit forbids. A franchise was “created by special act,” and given to “George H. Ensign and his associates.” In section one it is called a “right,” in section six, a “privilege,” whilst in section five it is called a “franchise.” But the entire vesting of these rights, privileges and franchises, all depend (by section eight) upon the condition precedent, that Ensign and his associates shall “duly organize themselves in conformity with the existing laws regulating corporations now in force in this State.”

Now, is it not indisputable that the Legislature intended that “Ensign and his associates” should not have, take, or enjoy these franchises as individuals? Is it not manifest that they would take merely as corporators? Was not the whole law made to “take effect” only by virtue of the act of becoming incorporated? After that act of incorporation, would not the company take the franchise rights and privileges

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granted, as the intended grantee? We respectfully submit that words cannot make this plainer; and that if the Court cannot look through the flimsy gauze-work which covers this Act, the Constitution itself is too easy of evasion to afford any protection against legislative power.

We respectfully submit that the Ensign Act is unconstitutional.

McAllisters & Bergin, also for the Respondent.

Charles N. Fox, A. Campbell, Sr., and J. P. Hoge, also for the Respondent.

By the Court, CROCKETT, J.:

On the former appeal, and at the first hearing of the present appeal, it was assumed, by both Court and counsel, that the rights and obligations of the defendant were to be ascertained by reference to the Act of April 23d, 1858, authorizing Ensign and his associates to lay down water-pipes in the streets of San Francisco. But on the rehearing the point is made for the first time by the defendant that the Ensign act is unconstitutional and void, and consequently can confer no rights on the plaintiff nor impose any duties on the defendant. The eighth section of the Act is in these words: "This Act shall not take effect unless the parties named in section one shall, within sixty days after its passage, duly organize themselves in conformity with the existing laws regulating corporations now in force in this State."

It is contended that this is an attempt to confer corporate rights by a special Act upon Ensign and his associates, in violation of section thirty-one, article fourth, of the Constitution, which provides that "corporations may be formed under general laws, but shall not be created by special Act, except for municipal purposes. All general laws and special Acts passed pursuant to this section may be altered from time to time, or repealed." The Act in question does not purport to organize Ensign and his associates as a cor-

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poration. On the contrary, it requires them to "organize themselves in conformity with the existing laws regulating corporations," as a condition on which they shall become entitled to the benefits and privileges enumerated in the Act. It is clear, therefore, that the corporation, when formed, did not derive its corporate existence from the Ensign Act; nor could it have done so under the Constitution. But it is claimed that, under this provisions of the Constitution, corporations must not only be formed under general laws, but that their rights, duties and obligations must be prescribed in the same method, and cannot be created by special Acts. On the other hand, it is insisted that the Constitution is wholly silent as to the powers and duties of corporations, and goes no further than to require that they shall be "formed" under general laws, and prohibits them from being "created by special Act;" but left the Legislature free to confer upon them, by either general laws or special Acts, such powers as it shall see fit. If this theory be correct, the constitutional provision has imposed upon the Legislature only the duty of providing by general laws the formulas by which corporations may be formed — the mere routine by which an artificial entity may be created, but has in no degree limited the power of the Legislature to confer upon it by special grant, at its discretion, any powers or privileges of whatsoever nature. On this construction, it would be competent for the Legislature to provide, by a general law, that any number of persons might become a body corporate, on filing a certificate stating their intention to that effect, and the name of the corporation; and the Legislature might then, by special grant, confer on the corporation any powers, however great, and any privileges, however deversified. It might authorize it to construct railroads, to transact the business of banking or insurance, deal in lands, and establish steamship lines. There would be no limit to its power in this respect. Nor when once granted by special Act could these privileges be recalled or modified by the Legislature. The grant, and its acceptance by the corporation, would have created a contract, the obligation of which could not be impaired by any subsequent legislation.

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Long prior to the adoption of our Constitution, experience had demonstrated the enormous evils resulting from legislation of this character. By means of hasty or corrupt legislation, great monopolies had been created, which were beyond legislative control. Capital was aggregated in the hands of large corporations, with peculiar and oppressive privileges, frequently procured through venal legislation. There was no uniformity in the powers exercised by corporations pursuing the same business. So long as they derived their powers, privileges and immunities from special legislative grants, these, of course, varied according to the temper of the Legislature; and the result was that each succeeding corporation had greater or less powers than its predecessors. With no limitation upon the discretion of the Legislature in respect to the particular powers and privileges to be granted to each, nor as to the innumerable purposes for which corporations might be formed, nor as to the term of their duration, gross abuse necessarily resulted from such a system. Extraordinary privileges, oppressive powers and onerous monopolies were conferred upon some and denied to others engaged in the same business. Their powers were frequently enlarged, and the terms of their duration extended by special grant. Under this system there was danger that large aggregations of capital would so practice upon the credulity or venality of legislative bodies as to secure the most oppressive monopolies, and seriously interfere with the enterprise and industry of the individual citizen. One of the latest and most startling illustrations of this danger is to be found in an Act of the Legislature of Louisiana, passed in the year 1869, by which a corporation was created by special grant, with the exclusive right to establish and maintain slaughterhouses and landings for cattle for a period of twenty-five years in the city of New Orleans and several of the contiguous parishes. The Constitution of Louisiana contains no limitation on the power of the Legislature to confer corporate rights by special Act, and the validity of this statute has been upheld by the Supreme Court of the State and of the United States. But this unrestricted power to

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endow corporations with peculiar and exclusive privileges would be less dangerous if a succeeding Legislature could correct the abuses practiced by its predecessor, and abolish or restrict the privileges once granted. It has been settled, however, by a long line of decisions, that corporations created by special Acts of the Legislature, and endowed by their charters with certain rights, cannot be deprived of them without their consent; that the Act of Incorporation creates a contract between the State and the corporation, which is protected by the Constitution of the United States, which prohibits any State from passing laws impairing the obligations of contracts. Powers improvidently conferred by special Acts, however onerous, cannot, therefore, be revoked or modified except with the consent of the corporation.

It was the especial purpose of the framers of our Constitution to guard against these abuses by providing that "corporations may be formed under general laws, but shall not be created by special Act, except for municipal purposes." Nor were they content to leave it doubtful whether the Legislature would have power to modify or abrogate these general laws or special acts to create municipal corporations, so as to affect the rights of existing corporations. Hence, the Constitution contains the further provision that all general laws and special acts "passed pursuant to this section may be altered from time to time, or repealed." It was intended by this provision to keep corporations within a wholesome legislative control, and to repel the assumption that their rights were held under a contract, which the Legislature was powerless to modify. Under these provisions the source from which private corporations must derive their powers and immunities is perfectly apparent. They can only "be formed under general laws," and can exercise no powers, except such as are derived from general laws. If this provision means nothing more than that the Legislature shall prescribe the mere formula by which a corporate entity may be called into life, and may then proceed to confer upon it by special act, at its discretion, extraordinary powers and privileges which

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it could not afterwards revoke or modify, because they were granted under special, and not general laws, then, indeed, has the Constitution signally failed to provide a remedy for the abuses already adverted to. On this construction, when a railroad corporation is once formed under a general law, the Legislature, by special grant, may confer upon it extraordinary powers, greatly in excess of those exercised by other similar corporations. It may authorize it to engage in banking, mining, or any other business enterprise, or to charge higher rates of fare than are permitted to other competing roads. In like manner it might discriminate in favor of a particular banking corporation, or confer special, or, perhaps, exclusive privileges on a particular mining, insurance or manufacturing corporation. But on the other, and the true construction of this constitutional provision, all private corporations must derive their powers from general laws, and not from special statutes. The general laws under which they were formed, and such others as shall afterward be enacted, must alone define their rights and powers. On this theory, all private corporations, formed for similar purposes, will stand upon the same footing, enjoy the same rights, and be subject to the same burdens, which cannot be increased or diminished, except by general laws applicable to all. In harmony with this theory, and accepting this as the true construction of the Constitution, the Legislature, at its first session, enacted general laws under which private corporations might be formed, and defining minutely their powers and duties. These laws have been modified from time to time, but have never omitted to prescribe the powers to be exercised and the duties to be performed by the corporation. Nothing short of some imperative rule of constitutional construction would justify us in holding, at this late day, that, though corporations must be "formed" under general laws, it is nevertheless competent for the Legislature, by special grant, to confer upon a corporation once organized, any powers, however extraordinary. We think, on the contrary, that no corporate rights or powers

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can be conferred by special grant, but must all be derived under general laws.

This brings us to the consideration of the Ensign Act, so-called. The first seven sections confer upon Ensign and his associates certain privileges, and impose upon them certain duties in respect to furnishing the city and county of San Francisco with water for the extinguishment of fires and other municipal uses. Section eight, already quoted, provides, that "this Act shall not take effect unless the parties named in section one shall, within sixty days after its passage, duly organize themselves in conformity with the existing laws regulating corporations now in force in this State." The grant, therefore, was not to take effect until Ensign and his associates had become a corporation under existing laws. It took effect as a grant, not to Ensign and his associates as private individuals, but to the corporation when formed. It was an attempt by the Legislature to confer, by special grant, upon a private corporation about to be formed, certain peculiar privileges, and to subject it to certain duties not common to other corporations formed under the same general law. For the reasons already stated, this was not within the constitutional power of the Legislature. When Ensign and his associates became a corporation under the general law, they took only such rights as were derived from that law, and were subject only to such duties as it imposed. The Legislature, by special Act, could not increase or diminish either.

On the first appeal, and at the former hearing on the present appeal, this point was not mooted, nor our attention directed to it by counsel; and in the view we then took of the case, our opinion was that the rights of the parties were to be determined by the Ensign Act, though on the first appeal this point was not necessarily involved in the decision. We see no reason to change the views we then expressed, if it be assumed that the Ensign Act was a valid and constitutional enactment. But we are satisfied it is not, and must be disregarded in determining the relative rights and duties of the parties. Tested by the general law under which the defendant was organized, it is under no

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obligation to furnish water to the City and County free of charge, except for the extinguishment of fires, during the pendency thereof.

Judgment and order affirmed.

The foregoing opinion was delivered at the April term, 1874, and a rehearing having been applied for, the following opinion, denying the same, was delivered at the July term, 1874.

In the former opinion on this appeal, we held that the Act of April 23, 1858, known as the "Ensign Act," is in violation of Art. IV, section thirty-one of the Constitution, which provides that "corporations may be formed under general laws, but shall not be created by special Act, except for municipal purposes." A rehearing is asked, partly on the ground that this clause of the Constitution has received a different construction in the case of the *California State Telegraph Company v. Alta Telegraph Company* (22 Cal. 398); and that this decision has become a rule of property in this State, and ought not now to be disturbed, even though it was erroneous. After a careful examination of that case, I am satisfied it cannot be sustained, either on reason or authority. Mr. Justice CROCKER, in delivering the opinion of the Court, refers to several adjudged cases as supporting the conclusions at which he arrived; but on examination of these cases shows that they were misapprehended by the Court, and do not support the decision.

The first case referred to was *Aurora v. West* (9 Ind. R. 85). The City of Aurora was incorporated by special Act, before the adoption of the new Constitution; and, by its charter, was expressly authorized to subscribe for stock "in any chartered company, for making roads to said city." The charter of the city was continued in force under the new Constitution, and the city subscribed for stock in a railroad company, incorporated to construct a railroad from St. Louis to Cincinnati, the route of which was so located as to pass through Aurora. The action was to enforce pay-

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ment of the bonds issued by the city to aid in the construction of the road. The power of the Legislature under the new Constitution (which provides that "corporations, other than banking, shall not be created by special Act, but may be formed under general laws"), in respect to conferring powers upon a corporation by special Act, was not involved in the case; and the point decided was that the Constitution imposes no limit on the Legislature as to the powers to be conferred on corporations by special Act, before the adoption of the new Constitution, and by general laws afterward. But the Court adds "under this Constitution, the law creating a corporation will be the index to the objects for which it was created, and to the powers with which it is endowed, if the grant does not conflict with some other provision of the Constitution than those above named, or exceed the power possessed by the Legislature itself." So far from lending support to the decision in the *California State Telegraph Company v. Alta Telegraph Company*, the extract above quoted maintains a proposition wholly at variance with that decision.

The next case referred to by Mr. Justice CROCKER, is *Gifford v. The New Jersey R. and T. Company* (2 Stockton, Ch. R. 171.) It will suffice to say of this case that the Constitution of New Jersey then contained no provision prohibiting the Legislature from creating corporations by special Act, and, of course, the question involved here could not have arisen in the case.

The next case referred to was the *C. P. and A. Railroad v. Erie* (27 Penn. St. R. 380). The Constitution of Pennsylvania provides that no law shall create, renew, or extend the charter of more than one corporation; and the question before the Court was, whether a certain Act of the Legislature had attempted to do either of these things. The decision was in the negative, and, of course, could have involved no point analogous to that under discussion here.

The only remaining case referred to was the *Syracuse City Bank v. Davis* (16 Barb. 188). The Constitution of New York provides that "the Legislature shall have no power

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to pass any Act granting any special charters for banking purposes; but corporations or associations may be formed for such purposes under general laws." The Syracuse City Bank was organized under the general law; but, in some trifling particulars, the forms prescribed by the general law were not complied with, and the Legislature passed a curative Act, to the effect that the bank should be deemed a valid corporation and to have been duly incorporated, notwithstanding these informalities. The Court held the Curative Act to be valid, on the ground that it did not create a corporation, but only remedied defects in the organization of one already created. That proposition has no analogy to the question involved here, which relates to the power of the Legislature to confer upon an existing corporation, by special Act, other powers than those derived from the general law. These are the only cases referred to by Mr. Justice CROCKER, and none of them support his ruling.

The decision is wholly unsupported by authority; and after, apparently, the most laborious research, counsel have failed to produce on the argument of this appeal a single adjudicated case, or an extract from any work on constitutional law, which lends the slightest support to the ruling in the *State Telegraph Company v. Alta Telegraph Company*. In the annals of American jurisprudence, that case, so far as I am advised, stands as the sole exponent of the propositions which it enunciates. On the other hand, authorities are not wanting in support of the opposite construction of this clause of the Constitution. In *Low v. The City of Marysville* (5 Cal. 214), the question was whether it was competent for the Legislature, by special Act, to authorize the city (a municipal corporation) to subscribe for stock in a steamboat company organized to establish a line of steamers plying between that city and San Francisco. In delivering the opinion of the Court, Chief Justice MURRAY holds, that "the powers of municipal corporations must be confined strictly to police or governmental purposes," and that the power conferred upon the corporation to subscribe for stock in a railroad, could not be granted by special Act; "for as it would have been in violation of the Constitution

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to create an incorporation by special Act, for other than municipal purposes, it follows that it would be equally unconstitutional to confer special power on a corporation already created. In other words, it would be doing by two Acts that which the Legislature could not do by one; and corporations for almost every purpose might be created by special Act, by first incorporating the stockholders as a municipal body." This reasoning, I think, is unanswerable, and the decision is a direct adjudication upon the question involved here.

The Constitution of Ohio contains these clauses:

"Section 1. The General Assembly shall pass no special Act conferring corporate powers.

"Section 2. Corporations may be formed under general laws; but all such laws may, from time to time, be altered or repealed."

In *Atkinson v. The M. & C. R. R. Co.* (15 Ohio State R. 35,) the Court, in construing these clauses, says: "Constitutional provisions would be of little value if they could be evaded by a mere change of forms. These provisions of the Constitution are too explicit to admit of the least doubt, that they were intended to disable the General Assembly from either creating corporations or conferring upon them corporate powers by special acts of legislation. It was intended to correct an existing evil, and to inaugurate the policy of placing all corporations of the same kind upon a perfect equality as to all future grants of power; of making such laws applicable to all parts of the State, and thereby securing the vigilance and attention of its whole representation; and, finally, of making all judicial constructions of their powers, or the restrictions imposed upon them, equally applicable to all corporations of the same class. We must give such a construction to the Constitution as will preserve its great leading objects intact." The difference between the language of the Ohio Constitution and our own on this point is more in form than substance, as is apparent from the debates in the convention which framed the Constitution of this State. The Constitution of Iowa provides that "the General Assembly shall not

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pass local or special laws in the following cases: * * * for the incorporation of cities and towns," and for other specified purposes. "In all the cases above enumerated, and in all other cases where a general law can be made applicable, all laws shall be general, and of uniform operation throughout the State."

The Legislature passed a special Act to amend the charter of the city of Davenport, a municipal corporation, and in *Ex parte Pritz*, (9 Iowa, 30,) the question before the Court was, whether the Legislature, by a special Act, could amend the charter of a municipal corporation, and thereby place it upon a different footing from other municipal corporations, organized under the general law. In considering this point, the Court says the intention of the Constitution was "to prevent special or local legislation; to require that the Legislature should pass general laws upon all the subjects named, and in all other cases where such general laws could be made applicable. There can be no question but that it was designed to confine the Legislature to general legislation, and leave the people, in their municipal capacity, to organize and carry on their government under such general laws. If this be so, then to say that the Legislature may not pass a law to incorporate a city, but may to amend an Act of incorporation in existence before the adoption of the Constitution, or charters formed under the general law, would make this provision of the Constitution practically amount to nothing. For if they may amend, they may, to the extent of passing an entire new law, except as to one section. Or they may at one session amend half the law, and at the next the other half; and thus the plain and positive prohibition of the fundamental law be evaded. By such a construction, the evil sought to be remedied would continue, if possible, in a more objectionable form." The same principle was substantially decided in the *Town of McGregor v. Bauliss*, (19 Iowa, 43.) It will be observed that by the Constitution of Iowa, the prohibition of the Constitution was against special laws "for the incorporation of cities and towns;" whilst in our Constitution the provision is that corporations, except for municipal pur-

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poses, shall not be "created" by special Act. In neither is the Legislature in express terms prohibited from conferring additional powers upon, or amending the charter of an existing corporation formed under the general law. The reasoning of the Supreme Court of Iowa, however, is conclusive on the point that, under our Constitution, the Legislature, by special Act, cannot either amend the charter of an existing corporation, or confer upon it powers and immunities not granted by the general law. The legal effect of the Ensign Act was precisely the same as though the corporation had already been formed under the general law, and the Legislature, by a special Act, had attempted to amend its charter by conferring upon it additional rights, and imposing upon it new obligations, different from those arising under the general law. That this was the legal effect of the Ensign Act was substantially decided in the case of the *Spring Valley Water Works v. San Francisco*, (22 Cal. 442,) the Court holding that the franchise granted to Ensign and his associates vested in the Spring Valley Water Company by operation of law, without an assignment, which was in effect holding that the grant was directly to the corporation. The Iowa cases are directly to the effect that this cannot be done under a constitutional provision strictly analogous to our own. No authority to the contrary has been produced, except the case of the *State Telegraph Company v. The Alta Telegraph Company*, which is supported by no other adjudication, nor by any text-writer, so far as I can discover, after a careful investigation. But the fact that it is directly opposed to all the authorities is not its only or its chief fault. Its reasoning is not only in conflict with the obvious meaning of the Constitution, but is subversive of one of its most important provisions. When the framers of that instrument ordained that corporations, except for municipal purposes, should not be "created" by special Act, they had in view the enormous evils which had resulted from endowing corporations with peculiar and often most onerous privileges, by special acts of legislation.

In the case of the *Dartmouth College v. Woodward*, (4 Wheat. 519), it had been decided by the Supreme Court of

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the United States, that privileges secured by Special Acts of incorporation, constituted contracts, which were protected by that clause of the Constitution of the United States, which prohibits a State from passing laws impairing the obligation of contracts. That case was followed by numerous other decisions of like import, in the same Court, and in almost every State of the Union, including New York, Massachusetts, New Hampshire, Pennsylvania, Michigan, Iowa, Indiana, Illinois and Virginia. In his work on Constitutional Limitations (page 279) Judge COOLEY says: "It is under the protection of the decision in the Dartmouth College case that the most enormous and threatening powers in our country have been created, some of the great and wealthy corporations actually having greater influence in the country at large, and upon the legislation of the country, than the States to which they owe their corporate existence. Every privilege granted or right conferred, no matter by what means or on what pretense, being made inviolable by the Constitution, the Government is frequently found stripped of its authority in very important particulars, by unwise, careless, or corrupt legislation; and a clause of the Federal Constitution, whose purpose was to preclude the repudiation of debts and just contracts, protects and perpetuates the evil. To guard against such calamities in the future, it is customary now for the people, in framing their constitutions, to forbid the granting of corporate power, except subject to amendment and repeal; but the improvident grants of an early day are beyond their reach." In view of these calamities, the framers of our Constitution were not content merely to reserve to the Legislature the power of amendment and repeal; but prohibited in terms the power to create corporations, except for municipal purposes, by special Act; and almost every State which has recently amended its Constitution has followed our example. In the face of these facts it is altogether incredible that in forbidding corporations, except for municipal purposes, to be "created" by special Act, it was intended to provide only that the mere forms by which a corporate entity was created should

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be prescribed by general laws; but that when thus formed, it may be endowed by special Act with any powers however diversified, at the discretion of the Legislature. On this theory, a banking corporation may be endowed by special Act, with power to build railroads, establish steamship lines, conduct mining or manufacturing enterprises, or to engage in any other business whatsoever. If this be the true construction of our constitutional provision, we are yet in the condition referred to by Judge COOLEY, when "the most enormous and threatening powers in our country" may be created; and when "some of the great and wealthy corporations" may hereafter exercise "greater influence in the country at large and upon the legislation of the country, than the States to which they owe their corporate existence." But it must be perfectly apparent to every unbiased mind, that this is not the correct interpretation of the Constitution, and that corporate powers cannot be granted, enlarged, or modified by special Act.

It is claimed, however, that the introduction of water into a city for the use of the inhabitants and of the corporate authorities, is a "municipal purpose" within the sense of the Constitution; and that private corporations may be created by special Act for such purposes. In *Lou v. Marysville*, *supra*, it was decided that the term "municipal purposes," as employed in this section of the Constitution, referred only to governmental and police powers, and that the Legislature is prohibited from conferring, even upon a municipal corporation, by special act, any powers, except for police and governmental purposes." But, however this may be in respect to the corporation itself, it is clear that the right to introduce water into a city cannot be conferred upon a private corporation by special act, upon the plea that it was a corporation organized for "municipal purposes" in the sense of the Constitution. If the Legislature, by special Act, can confer such powers upon a private corporation for supplying a city with water, it can confer similar powers upon all corporations for similar purposes. It might by special Act incorporate a gas company to furnish the inhabitants with gas, or a coal or wood com-

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pany to furnish them with fuel, or a paving company to pave the streets, or a slaughter house company to furnish the people with meat, or a milling company to supply them with bread. Every county in the State is a *quasi* municipal corporation; and it is the duty of the corporation to see that proper roads, bridges and public buildings are provided for the use of the inhabitants. On this theory, the Legislature, by special Act, might organize private corporations for all these purposes, and endow them with peculiar oppressive, and perhaps exclusive powers and privileges. In this way the constitutional prohibition would be frittered away, and would practically amount to nothing. It is too plain to admit of debate, that the provision permitting corporations "for municipal purposes" to be created by special Act, refers only to corporations for governmental and police purposes, and not to private corporations of any character or for any purpose.

It is further claimed that the decision in the case of the *California State Telegraph Co. v. The Alta Telegraph Co.*, has become a rule of property, and ought not now to be disturbed, even though it be conceded to be erroneous. In support of this proposition we have been referred to numerous statutes claimed to be similar to the Ensign Act, under which it is said great property rights have grown up. It may be that some, but I think no serious injury will result to property rights from overruling that decision. If it shall be found that serious inconvenience would otherwise result, the Legislature may amend the general law regulating corporations, so as to obviate the difficulties that would otherwise arise, and allow these corporations to re-incorporate under the new law. But, in any event, it is better that some temporary inconvenience should be submitted to, rather than that one of the most valuable provisions of the fundamental law should be practically obliterated. No greater calamity could befall this State, than to open wide the door leading to careless or corrupt legislation in the form of special acts granting peculiar and onerous privileges to private corporations.

Another point made in the petition for a rehearing is that

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by the third section of the Act of April 22, 1858, for the incorporation of water companies, it is provided that "all privileges, immunities, and franchises that may hereafter be granted to any individual or individuals, or to any corporation or corporations, relating to the introduction of fresh water into the City and County of San Francisco, or into any city or town in this State, for the use of the inhabitants thereof, are hereby granted to all companies incorporated, or that may hereafter become incorporated for the purposes aforesaid," and it is argued that by force of this provision the rights and privileges which, on the next day were granted to Ensign and his associates, were incorporated into, and became a part of the general law; and that, therefore, the Ensign Act was not a special Act in the sense of the Constitution. The substance of the proposition is that an Act, which on its face purports to be, and is in fact a special Act, may be converted into a general Act by a previous declaration of the Legislature that it shall be so considered. If this theory be sound, nothing can be easier than to evade the constitutional prohibition against this class of special legislation. It would only be necessary to pass a general law on the subject, and then declare that all special Acts thereafter passed shall be deemed general. But can the Legislature, by mere definition, change the essential attributes of a special Act? Will it not remain special, whatever effect the Legislature may attribute to it? The evil against which the Constitution provides was the granting, by special Act, to private corporations, peculiar rights and privileges, thus leading to careless and corrupt legislation. The evil would not be mitigated, if the Legislature should enact that all such special Acts should inure to the benefit of corporations organized under the general law. They would, nevertheless, remain special Acts, within the purview of this clause of the Constitution. The special Acts being void, could not be incorporated into the general law.

It is contended, however, that even though the Ensign Act be void, the defendant, as the successor in interest of the San Francisco City Water Works, is charged with the duty of

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furnishing to the city, free of charge, water for all municipal purposes, except for the sprinkling of streets. The San Francisco City Water Works was organized as a trading corporation, under the Corporation Act of 1853, as amended in 1855, and entered into a contract with the city to introduce water for the benefit of the inhabitants and for municipal uses. The contract, as originally entered into, was embodied in what is known as "Order No. 46 of the Board of Supervisors;" the fourth section of which provides that "the city and county, under the direction of the Board of Supervisors, shall be entitled to the free use of the water so introduced, for the purpose of extinguishing fires, and for the supply of all hydrants, fire-plugs, pumps and cisterns, and for all the public purposes of said city and county, except for sprinkling the streets; and the said city and county shall have the right, under the direction of the Board of Supervisors, to tap the pipes and connect the same with hydrants, fire-plugs, pumps, cisterns and other public works, at such places as they may deem proper." Section eight of said order is in these words: "It is hereby provided that should any other company, person or persons, receive permission to introduce water, for the purpose of supplying the city and county therewith, no more favorable terms shall be granted to such company or persons than to the company authorized under this order, without extending the same terms to the San Francisco City Water Works." Under this contract, water was introduced into the city in September, 1858, by the San Francisco City Water Works. But on the 22d day of April, 1858, a general law was passed for the incorporation of water companies, under which the Spring Valley Water Works was organized. This general law did not render it incumbent on corporations organized under it to furnish water to the city free of charge, except "in case of fire or other great necessity." The complaint avers that before and after the 18th of February, 1865, the Spring Valley Water Works was, and yet is, engaged in the business of introducing water into the city; and that on that day the San Francisco City Water Works conveyed and transferred

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to the Spring Valley Water Works all its property, franchises, rights and privileges, including the right to introduce water into the city; and that the Spring Valley Water Works has ever since held and exercised the rights and privileges under said orders and ordinances, and not otherwise. The answer admits the transfer, but denies that the Spring Valley Water Works exercises said rights and privileges, under said orders, and avers that the same are held and exercised under said orders as the same are modified by an Act of the Legislature of April 8, 1863. The first section of this Act provides that "in accordance with the recommendation of the Board of Supervisors of the City and County of San Francisco," expressed in certain resolutions of the Board, the San Francisco City Water Works is discharged from its obligation to pay the City and County a certain percentage of its gross earnings. The second section provides that "should any other company, person or persons, excepting the City and County of San Francisco, receive permission to introduce water for the purpose of supplying the said City and County therewith, no more favorable terms shall be granted to such company, person or persons, than are now enjoyed by the San Francisco City Water Works, without extending the same to the latter company." This is, in substance, a mere ratification by the Legislature of section eight of Order No. 46.

Under these circumstances, the question arises: "What were the duties and obligations of the Spring Valley Water Works in respect to furnishing water for municipal uses free of charge?" By its act of incorporation it was only bound to furnish water free of charge "in case of fire or other great necessity." If it is now under any additional obligation, it is because it has succeeded to the obligations of the San Francisco City Water Works. But if no transfer had been made, what would now have been the obligation of the latter company in respect to furnishing water free of charge for general municipal uses? By section eight of order number forty-six, ratified by the Act of April 8, 1863, this company could have been subjected to no greater

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burdens than were imposed upon any other corporation which was permitted to introduce water into the city. As we have seen, the Spring Valley Water Works had been permitted to introduce water, subject to no other obligation in this respect than to furnish it free of charge "in case of fire or other great necessity," and had in fact introduced it prior to February, 1865 — the date of the transfer. It is apparent, therefore, that at the date of the transfer the San Francisco City Water Works had been relieved under section eight of order number forty-six, ratified by the Act of the Legislature, from any greater burdens in this respect than were imposed upon the Spring Valley Water Works. It was bound to furnish water free of charge only "in case of fire or other great necessity." The transfer to the Spring Valley Water Works, therefore, wrought no change in its obligations in this respect.

It has been suggested that the grant to the Spring Valley Water Works under the Ensign Act, was not a grant of corporate rights, but only an easement permitting the company to lay its pipes through the streets, subject to the performance of certain duties imposed by the Act. The argument is that an easement of this character is property, which it was in the power of the State to grant to an existing corporation as it might grant property to any corporation, coupled with such conditions as it saw fit to impose; and that this is not a grant of corporate rights within the purview of the Constitution. It is a conclusive answer to this proposition that the Ensign Act did not grant to the Spring Valley Water Works any easement of this character which it did not already possess under the general law, under which it was incorporated. By the fifth section of the general Act (Statutes 1858, p. 219) the company had the absolute right "to use so much of the streets, ways and alleys, in any town, city, or city and county, or any public road therein, as may be necessary for laying pipes for conducting water into any such town, city, or city and county, or through or into any part or parts thereof." The corporation already having this right, under its Act of incorporation, it is clear that the Ensign Act conferred upon it no additional

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privileges in this respect. On the contrary, this Act attempts to limit the rights which the company already had, in this respect, by imposing upon it conditions not found in the general law; as, for example, that it shall lay down a certain number of feet of pipe within a specified time, and after the pipes are laid, shall place the streets in as good condition as they were before. Instead of granting a new easement, or enlarging that which the company already had, the only effect of the Ensign Act in this particular was an attempt to restrict the easement which the company already possessed. The Act must be read as though it had recited the fact that the corporation had already been organized under the general law which authorized it to lay down its pipes in the streets; and thereupon the Legislature proceeded, by special Act, to impose certain limitations upon the exercise of the right, coupled with the condition, that the corporation should furnish water for municipal uses, on terms different from those imposed by the general law, with the right, in a certain contingency, to charge higher rates for water than companies organized under the general law were allowed to charge. In other words, the Act conferred no new rights upon the corporation in respect to the use of the streets, but attempted to limit those it already had, and then proceeds to impose upon it certain duties, and endows it with certain immunities not belonging to corporations formed under the general law. It is clear, therefore, that there is no plausible pretext for the assertion that the Ensign Act conferred upon the corporation any new or additional easement in respect to the use of the streets; and, if valid, its only legal effect was to impose certain duties and confer certain rights upon the corporation essentially different from those appertaining to other similar corporations organized under the same general law. As we have already seen, this cannot be done, under our Constitution, by special Act. Other sufficient reasons might be assigned in support of our conclusions on this branch of the case. But it is sufficient for the present to say, that the Ensign Act did not confer upon the Spring Valley Water Works any new or enlarged easement

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in respect to the use of the streets; and the argument founded on the opposite hypothesis, must of course fall to the ground.

These views are decisive, I think, of the question under consideration.

But there are other reasons not less cogent why the proposition cannot be maintained. A private person can certainly grant to a corporation a right of way over his land, or any property, which, under its charter, the corporation is competent to take; and upon such terms and conditions as may be agreed upon. It is equally true that the State, in its capacity of a proprietor of lands, may do the same thing. It may, in that capacity, grant to a railroad corporation a right of way over lands belonging to the State, on such terms and conditions as it sees fit to impose. In these cases it is merely a matter of contract between parties capable of contracting, in respect to certain rights of property. But the State has no proprietary interest in the streets of a city dedicated to public use. In its capacity as a sovereign, it may regulate the use, or abolish it altogether. (*Polack v. San Francisco Orphan Asylum*, ante p. 490.) But, as a general rule, the fee is in the owners of the adjoining lands on each side, to the centre of the street, and the State can only regulate and control the easement which the public has over the land. When the State grants to a private corporation an easement over the streets, not common to the public at large, it acts in its sovereign capacity and grants a franchise, which enters into and forms an essential element in the corporate powers of the corporation; which becomes entitled to the right, not because the State has parted with any proprietary interest in the land, but because in its sovereign capacity, having the control of public highways, it has granted to the corporation a franchise, entitling it to an easement over the streets not common to the general public. This is purely a grant of corporate power, and nothing more or less, and, as we have already seen, such rights cannot be conferred by special Act. But even if it be conceded that the right to the use of the streets may be granted by special Act, still the Ensign Act must fail, because the right to

Opinion of McKinstry, J., concurring.

use the streets is inseparably blended with the grant of other rights, and the imposition of certain burdens, which are in plain violation of the Constitution. As, for example, the right in a certain contingency to charge higher rates for water than other corporations organized under the same general law, and the imposition of greater burdens upon the company, than are imposed by the general law. It is a well settled rule, that where a portion of an Act is constitutional and another portion is unconstitutional, if the two are so inseparably blended together as to make it clear that either clause would not have been enacted without the other, the whole Act must fall. It is perfectly clear that such is the condition of this Act, and that all its provisions must stand or fall together.

We are satisfied that these views are in strict accordance with the letter and spirit of the Constitution. On the opposite theory, the Legislature, by special Act, may grant to a railroad corporation the right to lay down its tracks in the streets on condition that it supply the inhabitants with water or gas, or keep the streets in repair at a specified price, thus opening the door to corrupt and vicious legislation, against which the Constitution has so carefully guarded.

Rehearing denied.

McKINSTY, J., concurring:

The general law providing for the incorporation of Water Companies took effect April 22, 1858; the "Ensign Act" was approved the next day.

The latter did not purport to confer the franchises therein granted on Ensign and his associates as individuals, but attempted to confer them on a corporation to be formed by Ensign and his associates when (or immediately after) such corporation should be formed under the general law.

I agree with Mr. Justice CROCKETT and with Mr. Justice RHODES, that the Legislature can neither pass a special Act granting powers or privileges to a particular corporation cre-

Opinion of McKinstry, J., concurring.

ated under the general law, which are not enjoyed by all other like corporations under the same law, nor pass a special Act limiting, or burthening with peculiar conditions, the rights or powers acquired by a particular corporation from the general law.

We are to ascertain the rights, privileges, powers, duties, and obligations of the Spring Valley Water Company, by reference only to the general law under which it was incorporated, and as if the Ensign Act had never been passed.

All corporations created under the general law acquired the right to charge such rates for water supplied to consumers as should be fixed by the commissioners to be appointed as therein provided. The Ensign Act attempted to guarantee to the Spring Valley Water Works twenty per cent. per annum on the capital by that company invested, by declaring that the commissioners should never fix the rates so low as to yield less than such twenty per centum.

The general law required all water companies to furnish water to the extent of their means, and free of charge, to the city or town to which water was conducted, "in case of fire or other great necessity." I express no opinion as to the precise meaning of the phrase "other great necessity." On the former appeal, and before I came to the bench, it was held by all the Justices qualified to sit in this case that these words did not include every municipal purpose. I shall assume that the construction given by the Court is correct. At a time, then, when the defendant — in common with all other corporations formed under the general law — was under obligation to furnish water to the city, into which water was conducted, "in case of fire or other great necessity," the Ensign Act attempted to impose upon the defendant the additional obligation to supply water to the city for all "other municipal purposes."

The Legislature could neither confer a benefit nor impose an obligation on the Spring Valley Water Works not conferred or imposed on all water companies by the general law. To confer a special benefit or impose a special obligation would be equally destructive of the uniformity which it is the object of section thirty-one, of Article IV. of the Constitution to secure.

Opinion of McKinstry, J., concurring.

I do not think the fact that the franchise to deliver water and charge tolls, or that the conduits of the company or right to use the streets, may constitute "property" subject to taxation, should influence the decision of the present case.

Assuming that a grant by the sovereign of the privilege of laying down mains and pipes in the public streets — an incident inseparably connected with the franchise to charge tolls for water — can be considered as a grant by the owner of the fee of an "interest in real estate," (a proposition to which I cannot assent,) the defendant was entitled to such interest in real estate by virtue of its incorporation under the general law, before the Ensign Act was by its terms to take effect. That act, if valid, could not operate a grant with a certain condition of property of which the defendant was already the owner, without the condition. To sustain the Ensign Act, in the particular under consideration, it must be held that all of a class of corporations being in the enjoyment of certain franchises and subject to certain obligations under a general law, the Legislature can relieve one of the corporations of a portion of these obligations, or add to the burden imposed on all, additional obligations binding on one alone.

The rights and duties of all corporations formed under the general law providing for the incorporation of water companies, are fixed and determined by its terms, and can only be changed or modified by amendment of the general law. And every such amendment must be made applicable to all corporations created under the general law.

I agree with Mr. Justice CROCKETT, that the validity of the Ensign Act is directly and necessarily involved in the decision of the present case, and I agree with the conclusions which he has reached in respect to the other questions discussed in his opinion, and in the order denying rehearing.

Mr. Chief Justice WALLACE, having been of counsel for the plaintiff, took no part in the decision.

Opinion of Rhodes, J., dissenting.

RHODES, J., dissenting:

The proposition that section thirty-one, of Article IV, of the Constitution, prohibits the passage of special Acts granting corporate powers to corporations, other than those created for municipal purposes; that this inhibition extends as well to a special Act conferring a particular corporate power, as to an Act providing for the entire organization of a particular corporation—is, in my judgment, fully sustained by the opinion of Mr. Justice CROCKETT; but, while concurring generally in his argument, I am of the opinion that the record does not present the question. There may be, and in my opinion there are, provisions in the *Ensign Act*, which are obnoxious to the constitutional objection just mentioned—such as the provision for fixing higher rates than other corporations are, by the general Act, allowed to charge—but they do not affect the other provisions of the Act. The Act grants to Ensign, his associates and assigns, the right to lay down water-pipes, etc., in the streets of the city, upon certain terms and conditions. Is this a grant of corporate power? In my opinion, it is not. Time will not permit me to enter into an elaborate discussion of this question; and, indeed, I think it unnecessary, for the question seems to lie in a narrow compass. A private person cannot grant to a corporation corporate power, but he may grant to it property, or rights in property, necessary or proper for the use of the corporation, unless it be forbidden by positive law or necessary implication, from taking such property or rights in property; and it is not a grant of corporate power. And such a grant may be on such terms and conditions as the parties may agree to, provided they are not in contravention of law. For instance, a lot-owner in the city might grant to the corporation, when authorized, as contemplated by the *Ensign Act*, the right to lay down water-pipes over his lot, in consideration of the payment of a sum of money, or the supply of a certain amount of water, or of all the water he might need for a certain purpose. The State might make the same grant in respect to land held by it, and on a like

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consideration. The State, to the extent of its control over the highways and streets within the State, may make grants of the like character. Such grants, whether made by private persons or the city, or the State, are not grants of corporate power, but are mere easements.

The State may, in my opinion, grant to a corporation any property which a private person might, if he was its owner; the grant may be made on the same terms and conditions that a private person might exact. In respect to grants of that character, the constitutional provision in question does not impose greater limitations upon the power of the State, than upon that of a private person. I do not understand that a grant, whether by a private person, or the city, or the State, to a street railroad company, of a right to extend the track of its road, whether with or without exacting conditions, or a consideration, is in violation of the provision of the Constitution in question. Our statute books are full of Acts making grants of that character. The acts granting the right of way to street railroad companies over certain streets, are familiar instances; also the acts granting to certain railroad companies subsidies, lands, and the right of way over certain streets in cities therein named; and grants of subsidies to certain telegraph companies, and many other grants that might be mentioned. In any of those cases, a private person owning the thing granted, might have made the grant, and have annexed conditions of the same character as those mentioned in the acts referred to; and whether made by the State or private persons, the grants would not confer corporate power. In this case the right granted is a right of way—a mere easement—an interest in land (*Appeal of N. B. & M. R. R. Co.*, 32 Cal. 505), and in my opinion, it is very clear, that the grant is not prohibited by the Constitution; that the Legislature had competent power to annex to the grant the conditions mentioned in the third section of the Ensign Act, and that they are valid and binding on Ensign, his associates and assigns.

If it be held, as is suggested, that the legislative grant of the easement to Ensign, his associates and as-

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signs, was void, because the right to acquire the same easement had been granted by the general law, and that the terms and conditions upon which the grant was made fail because the grant fails, then clearly the constitutional question in respect to the grant of corporate power does not arise in the case. But I do not understand that the grant in this case is void, for the reason suggested; and not being void, the Legislature had competent authority to prescribe any terms and conditions which were not prohibited by paramount law.

If the Legislature has the power, on making the grant of an easement to impose terms or conditions, they cannot, in my opinion, be held to be repugnant to the constitutional provision in question, on the ground that they are more onerous than those prescribed by the general law. The principal power granted to water companies is the power to collect rates for the supply of water. The condition here, to supply the municipality with water for certain purposes, certainly does not enlarge that power, nor, in my opinion, does it in any manner touch or relate to any power granted to such corporations. The right attempted to be granted, to collect higher rates than those which may be fixed for other corporations, is, in my opinion, severable from the other terms and conditions; and they are not void because it is void.

[No. 3,107.]**LUDWIG ALTSCHUL v. JAMES DOYLE, SR., ET AL.**

GRANTING NEW TRIAL.—The Supreme Court will not interfere with the action of the Court below in granting or refusing a new trial, when there is a substantial conflict in the evidence, and the circumstance that, intermediate the trial and the determination of the motion for a new trial, a change in the incumbency of the bench in the Court below had occurred, makes no difference in the application of the rule.

IDEM.—When a new trial is asked for on several grounds, and it is granted, and the record does not show for which one of the reasons it was granted, the order granting the new trial will not be reversed, if it may have been properly granted for any one of the reasons assigned.

Opinion of the Court — WALLACE, C. J.

APPEAL from the District Court, Twelfth Judicial District, City and County of San Francisco.

The plaintiff recovered judgment in an action of ejectment, and the defendants moved for a new trial. O. C. PRATT was the Judge of the Twelfth District Court, who presided at the trial, and his term of office having expired, his successor, E. W. McKINSTRY, granted a new trial.

The plaintiff appealed from the order granting a new trial.

E. A. Lawrence, for the Appellant.

E. L. B. Brooks and *Walter Van Dyke*, for the Respondents.

By the Court, WALLACE, C. J.:

The motion of the defendants for a new trial was based not only upon errors of law alleged to have been committed at the trial, but also upon the insufficiency of the evidence to justify the decision. The motion was granted by the Court below, but the particular ground or grounds upon which it was granted do not appear by the record. It may have been granted because the Court below was not satisfied with the evidence adduced upon some of the numerous sharply-disputed questions of fact involved, and it is a settled rule of practice prevailing in this Court not to interfere with the action of the trial Court in granting or refusing a new trial upon a question of fact, where there is a substantial conflict in the evidence. The circumstances, that intermediate the trial and the determination of the motion for a new trial, a change in the incumbency of the bench in the Court below had occurred, and that the motion was determined by the new incumbent, who had not presided at the trial, can make no difference in the application of the rule. The consideration, in the first instance, of the question, as to whether or not the decision upon a substantially-contested issue of fact is satisfactory to the judicial conscience, is a function of the trial Court as such; its determination

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by that Court is entitled to the utmost degree of deference at our hands; and upon looking into the record in this case, we find no reason to disturb the conclusion arrived at below.

Order affirmed. Remittitur forthwith.

Mr. Justice McKINSTRY did not express an opinion.

[No. 3,963.]

CATHERINE DOYLE AND JAMES DOYLE v. EDWARD FRANKLIN.

PLEADINGS IN EJECTMENT.—If a complaint in ejectment contains immaterial and irrelevant allegations, which would be stricken out on motion, the defendant, in his answer, need not controvert them.

DEFENSE IN EJECTMENT.—The defendant in ejectment need only defend against the material allegations in the complaint, that is, the allegations material to constitute a complaint in ejectment.

REVIEW OF ALLEGED ERROR ADMITTING EVIDENCE.—The alleged error of the Court below in admitting in evidence a judgment roll cannot be reviewed on appeal, unless the record contains the judgment roll, or a settled abstract of its contents.

PRESUMPTION THAT JUDGMENT IS CORRECT.—All intendments, consistent with the record in the appellate Court, must be taken in support of the judgment.

APPEAL from the District Court, Twelfth Judicial District, City and County of San Francisco.

Ejectment to recover fifty vara lots, numbers four, five and six, of block number two hundred and ninety, in the Western Addition of the city and county of San Francisco.

The complaint started out with an averment that, on the 28th day of April, 1865, the plaintiffs owned the demanded premises. It then averred the commencement of an action on said day by defendant Franklin against James Doyle and Mary Doyle, to recover the demanded premises, and that no summons was served, and the defendants did not know of the suit, but that *Sharp & Lloyd*, attorneys, appeared for James Doyle and Mary Doyle, and filed an an-

Argument for Respondents.

swer, but the defendants did not know of it. That the James Doyle for whom they appeared was not the plaintiff in this action, but his son; and that, October 10, 1865, the answer was withdrawn, and judgment rendered by default for the plaintiff. That on the 24th of October, 1865, a writ of restitution issued on the judgment, and the Sheriff ejected the plaintiffs from the land, and put Franklin, the defendant in this action, in the possession of the premises. That the plaintiffs did not know of the action till the Sheriff executed the writ. Then followed an averment of ouster by defendant Franklin, and an averment that Franklin pretended to be in possession of the land by virtue of the judgment, and had obtained an order of Court requiring the plaintiff Catherine to show cause why she should not be punished for contempt for disregarding the writ of possession. These averments seem to have been inserted in the writ for the purpose of attacking the validity of the former judgment recovered by the defendant Franklin, by raising an issue as to whether the former defendants James Doyle and Mary Doyle were the plaintiffs James Doyle and Catherine Doyle in this action. The answer set up that the person sued as Mary Doyle in the former action was the same person suing as Catherine Doyle in this action; and denied that the plaintiffs in this action did not employ *Sharp & Lloyd*, to appear for them in the former action.

The other facts are stated in the opinion.

Walter Van Dyke and *E. L. B. Brooks*, for the appellants, argued that the answer admitted the allegations in the complaint that the former judgment was not recovered against the plaintiffs in this action, and that therefore, the judgment roll should not have been admitted in evidence.

E. A. Lawrence, for the Respondents.

The only material averments were the ownership of plaintiffs and ouster by defendants. These are fully denied by the answer. The other allegations of the complaint are to be disregarded in this trial. (Pr. Act, Secs. 65, 66.)

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By the Court, WALLACE, C. J.:

When this cause was here upon a former occasion (40 Cal. R. 106) it was held that the complaint was in ejectment, though containing much immaterial matter which would have been stricken out upon objection, and that the answer averring that the plaintiffs here were parties to the former action of *Franklin v. Doyle*, and were concluded by the judgment in that action, left a plain issue of fact to be tried. The judgment was then reversed and the cause remanded, and, a new trial having been had in the Court below, judgment was rendered for the defendants. The present appeal was taken from an order denying the plaintiffs a new trial. It is plain, that treating the complaint as an action of ejectment, the answer of the defendants need only defend the material allegations of the complaint — that is, the allegations material to constitute a sufficient complaint in ejectment — and that the other and immaterial allegations, inserted therein, whether controverted by the answer or not, go for nothing.

The important question at the second trial seems to have been whether or not the present plaintiffs were, in point of fact, defendants in the action of *Franklin v. Doyle*, in which Franklin, defendant here, recovered the premises in controversy. At the close of the plaintiffs' case, the defendants moved the Court below for a nonsuit, which motion was denied. The defendants then offered in evidence the judgment roll in the case of *Franklin v. Doyle*, relied upon by them to defeat a recovery by the plaintiffs in this action. The roll was admitted by the Court below, and the plaintiffs excepted to the ruling of the Court, and this, as we understand from the counsel for the plaintiffs at the argument, constitutes the only point relied upon to reverse the order denying the motion for a new trial. It is clear, however, that the supposed error of the Court below, in admitting the roll in evidence, cannot be reviewed on this appeal, because the record before us does not set forth the roll or state its contents. It seems to have been inserted in the transcript in the first instance, but was subsequently,

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as we are informed by a memorandum annexed to the transcript, stricken out by the appellant at the request of the respondent. Of course, it is impossible for us to determine the admissibility of a record or other paper admitted in evidence at the trial, unless the record or paper so admitted, or a settled abstract of its material contents, is set forth in the record. It is true, that we see in the transcript here a statement of the objections made by counsel against its admissibility, but we cannot, in the present condition of the record, determine whether or not the roll offered was, in point of fact, open to the objections thus taken. Thus: "Mr. —, for plaintiffs, objects to the introduction of the papers, on the ground that neither of the plaintiffs in this suit were defendants in that suit," etc. Now, the roll thus objected to, for aught we can know, may, upon inspection by the Court below, have shown that, in point of fact, the plaintiffs in this suit were defendants in that suit, and the objection of the plaintiffs' counsel may have been overruled on that ground.

It is hardly necessary to refer in this connection to the settled rule that all intendments here, consistent with the record as presented, must be taken in support of the proceedings of the Court below, and that the burden is upon the appellant to make the alleged error manifest.

Order affirmed. Remittitur forthwith.

Mr. Justice McKINSTRY did not express an opinion.

[No. 3,968.]**LOUIS JAFFE v. JOHN SKAE.**

THE LAW OF A CASE.—A decision rendered in the Supreme Court upon facts appearing in the record, in which the legal effect of these facts is declared, is, in all subsequent proceedings in the case, and so long as the facts appear without material qualification, a final adjudication of the rights of the parties, from which the Court cannot depart, nor the parties relieve themselves.

PURCHASE OF LEASEHOLD INTEREST.—If a party agrees in writing to sell to another a leasehold interest which he owns in property, of which he is

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in possession, and the transfer is delayed several months by the consent of the parties, the purchaser, in an action against him to recover the purchase-money, may claim compensation for the value of the use and occupation during the period of delay.

APPEAL from the District Court, Twelfth Judicial District, City and County of San Francisco.

The plaintiff was the owner of a lease of a lot in San Francisco, made by Madeline Curdy to Thompson and Peyton, which ran from October 1, 1864, to October 1, 1869. On the 19th of June, 1866, the lessor gave a right of renewal for five years, which the plaintiff also owned. On the 13th of October, 1868, the plaintiff assigned the lease and right of renewal to Rosenfeldt and Birmingham, as security for money loaned by them to him. On the day therein named the plaintiff made and delivered to the defendant a writing, of which the following is a copy:

“Received, San Francisco, April 28, 1869, from John Skae, the sum of one thousand dollars in gold coin, on account payment of five thousand five hundred dollars to me for leasehold of lot on north line of Sutter street, one hundred and thirty-seven and six twelfths feet east of Kearny street; thence east thirty-four feet four and a half inches by north one hundred and four feet and six inches, which lease I now hold, and which I agree to transfer and convey to said Skae, together with the improvements on said lot for said sum of four thousand five hundred dollars balance.

“Witness:

“T. J. GALLAGHER,

“L. JAFFE.”

The defendant then paid the plaintiff one thousand dollars of the purchase-price. The assignment of the lease and right of renewal was delayed from time to time by consent of the parties. On the 12th day of January, 1870, the plaintiff, having obtained from Birmingham and Rosenfeldt a re-assignment of the lease, tendered an assignment thereof to the defendant, and demanded the purchase-price, less the one thousand dollars. In the mean time, the plaintiff had remained in possession. When the defendant made the purchase, he was negotiating for a purchase of the fee

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of the property. This action was brought to recover the purchase-price of the lease, less the one thousand dollars. The defendant, in his answer, did not claim any set-off of the value of the use and occupation from the date of the contract, April 18, 1869, until the tender of the assignment, January 12, 1870. The plaintiff, when he tendered the assignment, offered to deliver possession. The defendant refused to receive the assignment, and to pay the money.

The other facts are stated in the opinion.

Gray & Brandon, for the Appellant.

The legal title outstanding in another, in no way affected the case. All that was required of Jaffe was to be ready to convey to defendant, by a perfect title, whenever called upon to execute and deliver the instrument prepared by defendant's attorney for him, Rosenfeldt and Birmingham, to sign; or, if no demand was made on him to put him in default, then to be able to make title at the time it became necessary (after defendant's refusal to complete the transaction), for him to tender a conveyance. Hilliard on Vendors (2d Ed. 1868, p. 252, Sec. 6), reads as follows:

"If the vendor be willing, ready and able to make title at the time when he has contracted so to do, it is immaterial that he had no title at the date of his contract, especially where the vendee, at both periods, has notice of the facts of the case." Citing: *Tison v. Smith*, 8 Tex. 147; *Webb v. Austin*, 7 M. & G. 701; *Stowell v. Robinson*, 5 Scott, 196; *Shaw v. Rowley*, 16 M. & W. 810; *Chamberlain v. Lee*, 10 Simons, 445.

Wm. M. Pierson, for the Respondent.

By the Court, WALLACE, C. J.:

When this cause was before us on a former appeal, the judgment and order denying a new trial were reversed and in the opinion then delivered, we said: * * * "Upon looking into the record we observe no substantial conflict in the evidence, and we think that it established the case of

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the plaintiff." The case having been again tried in the Court below and judgment rendered for the defendant, this appeal is taken from the judgment, and it is insisted by the appellant that, upon the law of the case, as settled here upon the former appeal, the plaintiff is entitled to judgment.

1. It has always been the settled rule in this Court that a decision rendered here upon facts appearing in the record, in which the legal effect of those facts is declared, is, in all subsequent proceedings in the case, and so long as the facts themselves appear without material qualification, a final adjudication of the rights of the parties, from which the Court can not depart, nor the parties relieve themselves. This rule was laid down here in the early case of *Dewey v. Gray* (2 Cal. 374), which, in this respect, adopted the views of the Supreme Court of the United States, enunciated in *Washington Bridge Co. v. Stewart et al.* (3 How. 413), and the rule itself has been since uniformly maintained in this Court.

2. It is insisted, however, by the respondent, that the facts now appearing are, within the sense of the rule referred to, materially different from those appearing on the first appeal in this: that it now appears "that at the time the appellant made his contract with the respondent, April 28, 1869, he had no title whatever to the leasehold and right of renewal claimed to be owned by him, he having previously assigned both said lease and covenant of renewal to Birmingham and Rosenfeldt." But it also appears that in point of fact the assignment to these last named persons was not absolute, but only by way of mortgage security for money loaned to the appellant, and that the respondent was cognizant of the facts when he entered into the agreement of purchase, the appellant undertaking to obtain a re-assignment from Birmingham and Rosenfeldt. The title to the leasehold, which was the subject of sale, had not, therefore, passed from the appellant at the time of the making of the contract with the respondent. In January, 1870, the appellant obtained from Birmingham and Rosenfeldt a release of their mortgage lien in

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the form of a re-assignment of the leasehold, and tendered a proper assignment of the leasehold to the respondent, who then declined to receive it. It should have been observed that in the contract of sale, dated April 28, 1869, no time is fixed for the completion of the contract by the delivery of the assignment, and it is found by the Court below that the time for the completion of the contract had been postponed by mutual consent of the parties, from time to time, until about the middle of the following month of October. At some time between the middle of October, 1869, and the month of January following, the respondent, for the first time seems to have repudiated the agreement, and on the 12th of the latter month the appellant made the tender already referred to. We discover nothing in the facts of the case now presented, different in any particular material to be considered, from the facts as presented on the former appeal.

These views dispose of the case; but referring to the general line of argument pursued by the counsel for respondent, it may not be improper to add that a particular examination of the contract of April 28, 1869, will disclose the fact that the appellant agreed to sell to the respondent only the then existing term, which would expire on the first day of October, 1869, and did not agree to sell the right of renewal, which was a separate covenant made by the lessor nearly two years after the creation of the term.

The respondent, in his answer, had he chosen to do so, might have claimed compensation of the appellant for the value of the use and occupation of the premises subsequently to April 28, 1869, and so reduced the recovery to that extent. But no such claim was made upon his part.

Judgment reversed and cause remanded, with directions to render judgment for the plaintiff according to the prayer of his complaint.

Remittitur forthwith.

Mr. Justice McKINSTRY did not express an opinion.

Opinion of the Court.

[No. 4,203.]

H. REUBIN v. J. M. COHEN AND FRANK SPERLING.

PARTNERSHIP NOTE.—The mere fact that a partner, upon being informed that his copartner has given a firm note for his individual debt, does not deny his liability thereon, does not, *per se*, amount in point of law to a ratification or adoption of the note.

APPEAL from the District Court, Fourth Judicial District, City and County of San Francisco.

The defendants were doing business as partners, under the firm name of Cohen & Sperling. On the 1st day of March, 1872, Cohen gave Reubin the note of the firm for the sum of one thousand dollars. Sperling defended under an allegation in his answer, that Cohen owed Reubin the money before the partnership was formed, and gave the note for his individual debt. The plaintiff recovered judgment, and the defendant Sperling appealed.

The other facts are stated in the opinion.

J. Naphaly and McAllisters & Bergin, for the Appellant.

Quint & Hardy, for the Respondent.

By the COURT:

At the instance of the plaintiff, the Court below instructed the jury "that if Sperling was informed of the fact of the giving of these notes by his copartner, Cohen, in the name of the firm, and omitted to repudiate or disaffirm, within a reasonable time, what had been done by Cohen, he will be held to have ratified and adopted what he, Cohen, had done in the firm name."

The indebtedness for which the notes were given was the indebtedness of Cohen in the first instance, and not that of the copartnership firm of Cohen & Sperling. The instruction, assuming as it does that Sperling did not assent to the transaction at the time the note was delivered, and, of

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course, that he was not then bound thereby, nevertheless asserts the rule of law to be that, if he was afterward informed of the fact that the firm notes had been so given he would become bound thereby, unless he should thereupon, or within a reasonable time, "repudiate or disaffirm" them. It may be conceded that his failure to object under such circumstances would be evidence tending in some degree to show assent upon his part to the giving of the notes, and so the jury were substantially told in the instruction next preceding the one we are now considering. But to say that a mere failure to actively repudiate the transaction amounts *per se* in point of law, to a ratification or adoption of the notes, is unwarranted by recognized principles defining the powers and obligations of copartners.

Judgment and order denying new trial reversed, and cause remanded for a new trial.

[No. 4,060.]

P. O. LANDER v. JOHN B. BEERS AND MARY E. BEERS.

RULE WHEN TESTIMONY CONSISTS OF DEPOSITIONS.—When the testimony in the Court below is in the form of depositions, the Supreme Court, on appeal, will re-examine it, and is not bound by the rule which forbids disturbing a judgment where there is a conflict in the evidence.

FRAUDULENT SALE OF PROPERTY.—When a father, for the purpose of defrauding his creditors, purchases property and causes the same to be conveyed to a daughter, a Court of equity will, at the suit of a judgment creditor, declare the deed fraudulent and void.

APPEAL from the District Court, Third Judicial District, County of Alameda.

The plaintiff, on the 15th day of October, 1870, recovered a judgment against the defendant, John B. Beers, for two thousand nine hundred and seventy-four dollars, on a debt for money loaned. Two executions were issued on the judgment, on the 21st day of November, 1871, one to the

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Sheriff of Alameda county, and the other to the Sheriff of San Francisco, both of which were returned unsatisfied. The defendant, Mary E. Beers, was the daughter of the other defendant, who was a dentist by profession. The complaint alleged that the defendant, John B., in 1867, purchased certain lots in the city of Oakland, and that the same were then (December 15, 1871,) worth eight thousand dollars, and that the defendant purchased them with his own money, but, for the purpose of defrauding his creditors, had, when he purchased them, caused them to be conveyed to his daughter, the other defendant. The suit was in equity to have the deed to defendant Mary declared fraudulent and void, so that an execution might run against the property. The Court below dismissed the bill, and the plaintiff appealed.

• The other facts are stated in the opinion.

Currey & Evans, for the Appellant.

Hunt & Rising, for the Respondent.

By the COURT:

The evidence upon which the Court below rendered judgment for the defendants, and denied the motion of the plaintiff for a new trial, is substantially found in depositions, and, therefore, open to re-examination here upon the issues of fact involved. (*Wilson v. Cross*, 33 Cal. 60.)

A careful consideration of the evidence has satisfied us that in point of fact the defendant John B. Beers was the true and equitable owner of the several lots of lands described in the complaint, and that the claim of the defendant, Mary, thereto is merely colorable. The circumstances attending the acquisition of the property, the relationship between the defendants, and their habit of dealing with the property and with each other, all point directly to this conclusion.

The defendant, Mary, had no means of paying for the property, except with moneys derived directly or indirectly from her father, the other defendant in this case. The

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story of the legacy left her by her grandfather, and the circumstances under which the fact came to her knowledge are so intrinsically improbable that it must be, at least for the present, rejected. The defendant, John B. Beers, the judgment-debtor of the plaintiff, is shown to have been habitually earning some four thousand dollars per annum, at his profession, and no account is given of the disposition of this money. The moneys thus earned by him, and which he should have applied to the payment of the plaintiff's debt, seem to have been passed to his daughter, and the purchase of the premises was affected in her name. She had been constantly residing with her parents, and had not been engaged in any occupation ordinarily of a remunerative character. It is claimed that she earned money as the servant of her father, employed in the household of which she was a member. She is said to have been the nurse of her mother; that she received a stipulated sum per month for her services in that character, and that principally with the moneys earned in this way she was enabled to purchase first the one and afterwards the other of these properties. The negotiations for the purchase originated with her father, who seems to have transacted the business for the daughter, prepared the notes covering the deferred payments, attended to their payment from time to time, at maturity, etc., but in balancing the business accounts between the father and daughter, we do not discover that the former claimed or was paid anything for his services as agent for the latter. The daughter, in her capacity as servant and nurse of her mother, having earned of her father sufficient moneys to acquire the property for herself, then seems to have leased it to her father, who occupied it as a tenant to his servant at a stipulated monthly rent, etc. These circumstances and a variety of others of hardly less significance, which we will not stop now to detail, sufficiently explain themselves, and we are not satisfied with the findings of the Court below.

Judgment and order denying a new trial reversed, and cause remanded for a new trial. Remittitur forthwith.

Points decided.

[No. 10,093.]

THE PEOPLE v. JAMES RILEY.

SENTENCE TO IMPRISONMENT.—The Court must not sentence a prisoner convicted of a criminal offense to imprisonment for a term longer than that fixed in the Statute for the punishment of the crime of which he stands convicted.

IDEM.—If the Court imposes a longer term of imprisonment than that fixed by the Statute for the offense, the Supreme Court, on appeal, will reverse the judgment, and direct the Court below to proceed to judgment on the verdict.

APPEAL from the County Court, County of San Joaquin.

The facts are stated in the opinion.

J. A. Hosmer, for the Appellant.

Attorney-General Love, for the People.

By the Court, WALLACE, C. J.:

The defendant was indicted and found guilty of the crime of house-breaking in the day time, which is an offense punishable by imprisonment in the State prison for a term not exceeding five years. (Penal Code, section 462.)

Upon the coming in of the verdict the Court adjudged the defendant to suffer imprisonment in the State prison for the term of ten years.

The judgment is therefore reversed, and the cause remanded with directions to the Court below to proceed to judgment on the verdict.

[No. 10,071.]

THE PEOPLE v. JOHNSTON.

DEFECT IN INDICTMENT.—If an indictment is not signed or endorsed by the foreman of the Grand Jury, the defendant must take advantage of the defect by a motion to set it aside. If he goes to trial on a plea of not guilty, he waives the defect.

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APPEAL from the District Court, Eleventh Judicial District, County of Amador.

The defendant was indicted for the crime of murder in the first degree, was convicted, and appealed.

The other facts are stated in the opinion.

Jo Hamilton, for the Appellant, argued that the indictment was not endorsed by the foreman of the Grand Jury, as required by sections nine hundred and forty, nine hundred and forty-one, nine hundred and ninety-five and nine hundred and ninety-six of the Penal Code.

Attorney-General Love, for the People, argued that a motion should have been made in the Court below, to set aside the indictment, as required by section nine hundred and ninety-six of the Penal Code, and cited *People v. Lawrence*, 21 Cal. 378.

By the COURT:

The only point made for the prisoner is that the indictment does not appear to have been signed or indorsed by the foreman of the Grand Jury. No motion to set aside the indictment was made by the prisoner in the Court below, but the cause was tried upon the plea of not guilty, interposed by him. By section nine hundred and ninety-six of the Penal Code, which substantially corresponds with section two hundred and eighty of the Criminal Practice Act formerly in force, an objection of this character, to be availed of, is to be made by motion of the prisoner to set aside the indictment, and his failure to make such a motion precludes him from afterwards taking the objection.

Judgment and order denying new trial affirmed. Remittitur forthwith.

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[No. 10,094.]

THE PEOPLE v. JAMES M. BARNES.

EVIDENCE ON TRIAL FOR BURGLARY.—The prosecution, in an indictment for the crime of burglary alleged to have been committed by breaking and entering the room of D. with the intent to steal, cannot prove that the defendant entered a room of D. different from that alleged in the indictment, and at a time different from that alleged in the indictment, and stole money from D.

APPEAL from the County Court, County of Yolo.

The indictment alleged that the defendant on or about the 31st day of March, 1874, at the County of Yolo, in the night time, broke and entered the sleeping apartment of E. F. Dubois, in the Capitol Hotel, in the town of Woodland, with the intent to steal the goods of said Dubois. On the trial, Mr. Dubois was called as a witness by the prosecution, and testified in the course of his examination, against the objection of the defendant, that, on the night of the 30th of November, the night previous to the alleged burglary, he occupied a room in the Capitol Hotel, different from that alleged to have been broken, and adjoining thereto, and that defendant went with him into the room when he went to bed, and after he retired to bed, the defendant stole a half dollar in silver coin from his pocket, and then left the room. The defendant appealed.

The other facts are stated in the opinion.

J. C. Ball, for the Appellant.

Attorney-General Love, for the Respondent.

By the Court WALLACE, C. J.:

The defendant was indicted and convicted of the crime of burglary, in breaking and entering the room and sleeping apartment of one Dubois, with intent to steal, etc.

On the trial the District Attorney, as part of his case in chief, was permitted, against the objection of the defend-

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ant, to prove that at a time and place admitted to be other than and distinct from those mentioned or intended to be charged in the indictment, the defendant entered a room, at the time occupied by Dubois, and stole a sum of money from him.

Upon settled principles governing the introduction of evidence in criminal cases, this was erroneous, and the judgment is reversed and the cause remanded for a new trial.

[No. 10,105.]

THE PEOPLE v. PERDUE.

BAIL AFTER JUDGMENT IN CRIMINAL CASE.—The fact that a prisoner has been convicted of the crime of manslaughter, and sentenced, does not, in law, afford a reason why the District Judge should refuse to entertain an application to admit him to bail, pending the appeal.

IDEM.—It is a matter of discretion, whether a prisoner, who has been convicted of manslaughter, and sentenced, should be admitted to bail pending an appeal taken by him.

TO WHOM APPLICATION FOR BAIL SHOULD BE MADE.—In practice, the power to admit a prisoner to bail, pending an appeal taken by him, ought not to be exercised by the Supreme Court in the first instance, nor until after the determination upon its merits, of an application for bail, before the Judge who tried the cause.

APPEAL from the District Court of the Tenth Judicial District, County of Yuba.

The facts are stated in the opinion.

J. O. Goodwin, for the motion.

Attorney-General Love, contra.

By the Court, WALLACE, C. J.:

The prisoner, adjudged guilty of the crime of manslaughter, and sentenced to suffer imprisonment in the State Prison for the period of two years, has prosecuted an appeal, and now moves that he be admitted to bail pending the appeal. The statute (Penal Code, Sec. 1,272) provides

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that in such a case as this the prisoner may be admitted to bail "as a matter of discretion." The views I entertain upon the general question were expressed in *Ex parte Hoge*, ante p. 3. In that case the Judge of the Court in which the prisoner had been convicted had considered his application, and had refused to admit him to bail. It is understood that in the present case the Judge of the Court below has refused to consider the application of the prisoner because the appeal taken had brought the case to this Court. That circumstance, in point of law, afforded no reason why the application should not be entertained by the District Judge. The facts and circumstances going to make up the legal discretion in the sound exercise of which the prisoner may be admitted to bail, are necessarily within the knowledge of the Judge who presided at the trial, and, in practice, the power to admit to bail pending the appeal, ought not to be exercised by us in the first instance, or until after the determination of the application below upon its merits.

The motion made here must, therefore, be denied, with leave to the prisoner to renew the application to the Judge of the Court below.

So ordered.

[No. 10,083.]

THE PEOPLE v. J. L. REED.

EVIDENCE THAT WITNESS IS A PROSTITUTE.—If the evidence of a witness, introduced by the people in a criminal case, shows that she is a prostitute, the defendant is not injured by a refusal of the Court to allow him to prove that she is reputed to be a woman of that character.

APPEAL from the County Court, County of Humboldt.

The defendant was convicted of the crime of larceny, on the 30th day of January, 1874, and appealed.

The prosecution called Jenny M. Young as a witness. The defendant endeavored to impeach her character for truth and veracity by showing that she was a prostitute.

Points decided.

The Court refused to allow it. The defendant was convicted and appealed.

The other facts are stated in the opinion.

S. M. Buck and *G. W. Spaulding*, for the Appellant.

Attorney-General Love, for the People.

By the COURT:

It is unnecessary for us to decide whether the Court erred in excluding the evidence tending to prove that the witness, Mrs. Young, was reputed to be a prostitute.

If the evidence was improperly excluded, it is perfectly clear the error caused no damage to the defendant, inasmuch as her own testimony left no possible room for doubt that she was a woman of that character.

Some portions of the charge to the jury may not be wholly unobjectionable. But, considered as a whole, we think it expounded the law correctly, and the objectionable portions could not have misled the jury. The other points made by counsel are not tenable, and need not be particularly noticed.

Judgment affirmed. Remittitur forthwith.

[No. 4,101.]

ASSARIA REWRICK v. JOHN B. GOLDSTONE.

CONTRACT IN THE ALTERNATIVE.—If a person purchases property from another, and contracts in the alternative, to either pay the purchase-price at a day named, or reconvey the property, he must make his election on the day named, and if he does not, he loses his right of election.

IDEM.—When a contract is in the alternative, the party who is to perform must make his election on the day the promise is to be performed. He cannot wait until the next day after he is in default.

CLAUSES IN CONTRACT MAKING CONVEYANCE NULL AND VOID.—If there is a provision in a contract between the purchaser and seller of personal property, that the seller shall pay the purchase-price at the end of two years, or reconvey the property, and that, if the purchase-price is not paid, the conveyance shall become null and void, but that the pur-

Argument for Respondent.

chaser may sell within two years, a sale within the two years prevents the property from vesting in the seller on a failure to pay the money. **COPY OF WRITING AS EVIDENCE.**— If a copy of a conveyance is admitted in evidence, without an objection that it is not the best evidence, or that the loss of the original is not shown, it has the same effect as evidence that the original would have had.

THE plaintiff, on the 24th day of June, 1871, sold the defendant an undivided one half of a patent for a stave sawing machine. The defendant paid him one hundred dollars down, and was to pay him nine hundred dollars two years from the day of sale, or, in default thereof, was to reconvey the property. This action was brought to recover the nine hundred dollars. The plaintiff, on the trial, offered in evidence a certified copy of a deed from the defendant to the Pacific Stave and Barrel Manufacturing Company, of the patent conveyed, recorded in the office of the Recorder of the City and County of San Francisco. The plaintiff recovered judgment, and the defendant appealed.

The other facts are stated in the opinion.

P. B. Ladd, for the Appellant.

The Court erred in admitting the bill of sale; for, if the defendant had no interest in the patent-right beyond the term of two years, he could and did convey no interest beyond that time, and his bill of sale to the company was irrelevant, incompetent and immaterial, and should not have been let in.

W. H. Rhodes, for Respondent.

Parsons (in 2 Cont. 163), thus states the rule: "If the promise be to pay money at a certain time, or to deliver certain chattels, it is a promise in the alternative; and the alternative belongs to the promisor. He may do either the one or the other at his election; nor need he make his election until the time when the promise is to be performed; but after that day has passed without election on his part, the promisee has an absolute right to the money, and may bring his action for it." Citing many authorities. See also the following: Chitt. Con. 729, note 2; 2 Story Cont.

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Sec. 969; 1 Civ. Code Cal. Art. 1,449; Abbott's Form, 244, note *p*; 8 Cow. 35; 3 Wend. 374; 22 Cal. 69; 7 Ala. 775; 4 Yerg. 177; 5 Hump. 423; 2 Green (Iowa), 205; 7 John, 465; 1 Bail. S. C. 136; 3 Scam. 389.

By the Court, WALLACE, C. J.:

The defendant was to pay nine hundred dollars at the expiration of two years from the date of the contract, that is, he was to pay on the 24th of June, 1873, or in default thereof, he was to reconvey the property purchased. He did neither, and the action to recover the money due was commenced on the 26th day of June, 1873. If the promise upon his part is to be considered as a promise in the alternative, he had the election to pay the price or return the property, but he was bound to make the election at the time when the promise was to be performed, and not having done so, the plaintiff had thereafter an absolute right to the money. We do not understand the defendant to controvert this as being the general rule of law applicable to contracts in the alternative. The argument upon his part, as we understand it, is that his right and his consequent duty to return the property arose only upon his default in the payment of the money; that, having the whole of the 24th of June, 1873, in which to pay the money, he was first in default for its non-payment on the 25th, which being an indivisible point of time, it resulted that on the next day, the 26th, he might, under the terms of the contract, have reconveyed the property in discharge of his covenant. But we cannot assent to this view. As we observed at the argument, it attributes too much force to the apparently casual expression "or in default thereof," found in the contract. The prime object of the agreement was a sale for money, part of which was paid in hand, and the remainder to be paid in two years thereafter. The obligation to pay was not absolute upon the defendant, but in default of payment; that is, as we interpret the contract, instead of payment, or in lieu of payment, the defendant might discharge himself by returning the property purchased, but in

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either case he was absolutely bound to perform at the expiration of two years from the date of the contract.

The interest in the patent-right which was sold to the defendant has not been vested in the plaintiff by the failure of the former to perform his contract. The provision found in the contract, to the effect that upon such failure upon the part of the defendant, the conveyance should thereby be "null and void," was qualified by the further stipulation that the defendant might, nevertheless, sell the interest within the two years' time mentioned therein, and the proof shows that he did, in September, 1871, make sale of it to the Pacific Patent Stave and Barrel Manufacturing Company. It is true that this fact was made to appear only by a copy of the instrument of conveyance made to the company, but it was not objected that the instrument was a copy merely, or was not the best evidence, or that the original had not been accounted for. The only "objection taken was the argumentative one that" it could "not affect the question whether the defendant took anything by virtue of his contract with the plaintiff." And this objection, if it amount to one, was properly overruled.

Judgment and order denying new trial affirmed.

[No. 10,085.]

THE PEOPLE v. THOMAS McCARTY.

CHALLENGE TO JUROR.—If the prosecution, in a criminal case, pass the jury to the defendant, who declines to make any challenge, the prosecution may then interpose a peremptory challenge to a juror, before he is sworn.

ARREST OF JUDGMENT.—A motion in arrest of judgment must be founded on some of the defects mentioned in section one thousand and four of the Penal Code.

VERDICT IN CRIMINAL CASE.—An informal verdict in a criminal case is sufficient, if it can be clearly understood as being a general verdict of guilty or not guilty.

IDEM.—A verdict reading, "we the undersigned, jurors, find a verdict of murder in the second degree," is a good verdict of guilty of the crime of murder in the second degree.

Opinion of the Court.

APPEAL from the District Court, Eighteenth Judicial District, County of San Diego.

The defendant was indicted for the crime of murder. He moved that the judgment be arrested, because he had not been found guilty by the jury, and because the jury had found him not guilty, and the verdict had been rendered by a jury of one. The Court below denied the motion.

Wallace Leach and *Levi Chase*, for the Appellant, argued that it was the duty of the People to have exercised their right of peremptory challenge first, and that not having exercised it, they had thereby waived their right to make a peremptory challenge. They also argued, that the verdict did not support the judgment, and cited, Penal Code, sections one thousand one hundred and fifty and one thousand one hundred and fifty-one; that the verdict did not contain the defendant's name, except in the title, and that it was the verdict of one man, because it read "we the jurors," and was signed by only one of the jury.

John L. Love, Attorney-General, for the People, argued that the right to a peremptory challenge was only lost when the juror was sworn, and cited section one thousand and sixty-eight of the Penal Code; and that the motion in arrest of judgment was properly denied, and cited sections one thousand one hundred and eighty-five, one thousand one hundred and eighty-six and one thousand and four of the Penal Code. He also argued that the verdict was a good verdict of guilty, and cited section one thousand one hundred and sixty-one of the Penal Code, and that it must be construed by our penal statutes and not by the common law.

By the COURT:

1. There was no error in allowing the prosecution to interpose a peremptory challenge to one of the jurors before he had been sworn. The prosecution had passed the panel to the defendant, who had declined to make any challenge,

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and thereupon the prosecution were permitted to interpose a peremptory challenge to one of the panel. The prosecution had not accepted the jurors by merely passing them to the defendant for examination; nor had the jury been sworn, and the peremptory challenge was in fact interposed first by the People, in accordance with section one thousand and eighty-eight of the Penal Code.

2. The argument of counsel for the prisoner does not refer us to any portion of the voluminous statements of the evidence in the record supposed to present the point that the verdict is not supported by the evidence, and our own examination has not enabled us to discover anything in support of the position.

3. The motion in arrest of judgment was properly overruled, because it was not founded on any of the defects mentioned in section one thousand and four of the Penal Code. (*People v. Fair*, 43 Cal. 137.)

4. The last point relied on is based upon a supposed defect in the form of the verdict as rendered. The verdict entitled of the action, was as follows: "We, the undersigned jurors, find a verdict of murder in the second degree. A. J. Chase, foreman;" and this verdict, upon being recorded, was read to the jury, and each of the jurors answered that it was his verdict. The Penal Code contains a form of the general verdict to be rendered by the jury upon a plea of not guilty, and defines the import of a verdict when found in accordance with the form there given. But an adherence by the jury to the form of the verdict there given is not made essential by the statute; a mere departure from such form does not, of itself, vitiate the verdict (section one thousand four hundred and four); and, under section one thousand one hundred and sixty-one of the same Code, an informal verdict is sufficient, if it can be clearly understood as being a general verdict of guilty or not guilty. There is no difficulty in understanding the verdict rendered here as being a verdict that the defendant is guilty of the crime of murder in the second degree charged in the indictment.

Judgment and order affirmed. Remittitur forthwith.

Argument for Appellants.

[No. 4,110.]

THE PEOPLE OF THE CITY AND COUNTY OF SAN FRANCISCO v. BARTLETT DOE AND J. S. DOE.

COMPLAINT FOR STREET ASSESSMENT.— The complaint, in an action to enforce a lien for a street assessment in San Francisco, must aver that the defendants are the owners of, or have some interest in the land sought to be charged with the alleged lien.

APPEAL from the District Court, Twelfth Judicial District, City and County of San Francisco.

Action to enforce an alleged lien on a lot in San Francisco, for the improvement of the street on which the lot fronted. The complaint failed to aver that the defendants owned, or had any interest in the lot, or that the assessment was against them; but alleged that the assessment was against the lot. The defendants demurred to the complaint; the Court sustained the demurrer, and the plaintiff declining to amend, judgment was rendered for the defendants.

The plaintiff appealed.

W. C. Burnett and E. F. Preston, for the Appellant.

The complaint is drawn in conformity with the provisions of the statute. Statute 1869-70 (Sec. 9, p. 899) providing the form of the complaint in this class of actions. Let us examine the requirements of the statute, and compare the allegations of the complaint therewith:

“In bringing an action to recover street assessments, the complaint need not show any of the proceedings prior to the issuance of the assessment diagram and certificate, but it shall be held legally sufficient if it shows the title of the Court in which the action is brought; the parties plaintiff and defendant;” “the date of the issuance of the assessment;” “the date of the recording thereof;” “the book and page where recorded;” “a general statement of the work done;” “a description of the lot or lots sought to be charged with the assessment;” “the amount assessed thereon;” “that the same remains unpaid,” “and the proper prayer for relief.”

Opinion of the Court.

Theodore H. Hittel, for the Respondents.

The only ground upon which appellant relies for a reversal of the judgment is, "that every requirement of the law is answered by the allegations of the complaint." Our reply is twofold: •

1st. That the complaint is not sufficient under the statute; and,

2d. That if the statute authorized such a complaint it would be unconstitutional.

The law under which the suit was commenced (Stats. 1869-70, 898, Sec. 9) provides that actions for the collection of delinquent street assessments shall be brought in the name of The People of the City and County, etc., "and against the owners and all persons having any interest therein;" in other words, it prescribes who the parties, plaintiff and defendant, are to be. It also requires the complaint, among other things, "to show the parties plaintiff and defendant,"—that is, as we contend, to show by proper averments who are the owners and parties interested. Such, and such only, can, under the statute, be parties defendant, and such the statute expressly requires to be "shown."

The complaint here professes in the caption to be against "Bartlett Doe and J. S. Doe *et al.*," and in the body to be against "defendants Bartlett Doe and J. S. Doe." There is no allegation that they or either of them own the property, or have or ever had any interest in it.

By the COURT:

We think that in proceedings to recover upon a street assessment, it is necessary that the complaint should allege that the defendants are the owners, or have some interest in the premises sought to be charged with the alleged lien. By the thirteenth section of the Act, it is expressly provided in terms that actions for the collection of any delinquent street assessment shall be brought * * *
"against the owners and all persons having any interest

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therein;" and unless the defendants are alleged to be persons of that character, there would appear to be no reason to implead them as defendants, and no authority to enforce the lien in the absence of the real parties in interest.

Judgment affirmed.

[No. 4,104.]

THOMAS H. HEERMAN v. E. H. SAWYER AND
ISAIAH HANSCOM.

SETTING ASIDE A DEFAULT.— An order setting aside a default and judgment must prescribe the payment of the previous costs, as a condition precedent.

APPEAL from the District Court, Fifteenth Judicial District, City and County of San Francisco.

The plaintiff recovered a judgment against the defendants by default. They moved to set aside the default, and the Court made an order setting it aside, but the order did not prescribe the payment of costs as a condition. The plaintiff appealed.

McElrath & Osment and *Alex. Campbell, Sr.*, for the Appellant.

A. Campbell, for the Respondents.

By the Court, WALLACE, C. J.:

The order setting aside the default and judgment is erroneous for the reason that payment of previous costs is not imposed upon the defendant as a condition of setting aside the judgment. The four hundred and seventy-third section of the Code of Civil Procedure (which, in this respect, is a copy of the sixty-eighth section of the former Practice Act,) provides that a default may be relieved against "upon such terms as may be just, and upon payment of costs;" and it has always been held here that the imposi-

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tion of costs upon the moving party was indispensable to the validity of the order opening the default. (*People v. O'Connell*, 23 Cal. 281; *How v. Independence Co.* 29 Id. 72; *Bailey v. Taafe*, Id. 422.) This view renders it unnecessary to consider the points presented by counsel. On the return of the case the Court below can, of course, rehear the application upon the moving papers, and upon such other and further showing as it may permit to be made.

Order reversed.

[No. 4,384.]

TEMPLETON v. COBURN.

FRANCHISE TO CONSTRUCT A WHARF.—An application to the Board of Supervisors for a franchise to construct a wharf in accordance with the provisions of the Act of March 1, 1870, must particularly describe the locality of the wharf.

APPEAL from the District Court of the Twelfth Judicial District, County of San Mateo.

The action was brought to condemn certain lands owned by the defendants to the use of a wharf and chute, to construct which the plaintiffs alleged that they were possessed of a franchise granted by the Board of Supervisors of San Mateo County. The defendants, in their answer, denied that the plaintiffs were the owners of any franchise. At the trial it appeared that the plaintiffs had presented a petition to the Board of Supervisors, in which they asked for a franchise "to build a wharf and chute, not to exceed seventy-five feet in width, and to be located on the northeast quarter of section three, in township nine south, range five west, Mount Diablo meridian, in said county, near what is known as Pigeon Point shipping-place, commencing at tide-water, near the bluff, at said shipping-place, and extending in a southeasterly direction over the overflowed and submerged lands of this State to navigable water in the Pacific Ocean, a distance that will not interfere with free navigation, and to use the same for a term of twenty years,

Argument for Respondents.

together with the further right to keep unencumbered a strip of the overflowed and submerged land on each side of said wharf and chute of one hundred and fifty-five feet in width from high-water mark to navigable water, to be used for the purpose of landing, loading and unloading of water crafts for the same number of years." In October, 1870, the Board made an order granting the prayer of the petition, and describing the location of the wharf in the same language as that used in the petition. Judgment was rendered in favor of the plaintiffs; the defendants moved for a new trial, which was refused, and they appealed from the judgment and from the order denying the new trial.

The Act of March 1, 1870, under which the plaintiffs applied for their franchise, in section two, contains the following provision: "Persons desiring to build wharves, chutes and piers on the overflowed and submerged lands of this State shall make a plan of the wharf, chutes and piers they desire to build, and of the land within three hundred feet of such proposed wharf, chutes and piers, with the names of the owners or claimants of such lands, and the names of the waters into which such wharf, chutes and piers proposed to be extended written thereon; and shall also make and sign an application to the Board of Supervisors of the county in which the location is situated, for a grant of such franchise, in which application the locality of the wharf, chutes and piers proposed to be built shall be particularly described, and the time named when the application shall be made." (Stats. 1869-70, p. 526.)

Williams & Thornton, for Appellants.

The plaintiffs have no franchise to build a wharf and chute. The application to the Board of Supervisors was insufficient to give the Board jurisdiction to grant the franchise, in that it failed to describe the location of the wharf and chute with the particularity required by the statute. (Stats. 1869-70, p. 526.)

Charles N. Fox, for Respondents.

The application describes the location to be on the

Statement of Facts.

northeast quarter of section three, "near what is known as Pigeon Point shipping-place, commencing at tide-water near the bluff of said shipping-place." That is a description of the location by reference to visible monuments, fixed, definite and certain, easily ascertained, and to which any erroneous description by imaginary boundaries and false calls must yield. (*Vance v. Fore*, 24 Cal. 435; *Reed v. Spicer*, 27 Cal. 57; *Reamer v. Nesmith*, 34 Cal. 624; *Piper v. True*, 36 Cal. 606; *Mills v. Lux*, 45 Cal. 273.)

The COURT reversed the judgment and directed that the action be dismissed on the ground that the application did not describe the location of the wharf and chute, with the degree of particularity required by section two, of the Act of March 1, 1870. (Stats. 1869-70, p. 526.)

[No. 4,383.]

PENNINGTON v. BAEHR.

SIGNING BY PRINTED FAC SIMILE.—Coupons of bonds may be signed by a printed *fac simile* of the maker's autograph, adopted by the maker for that purpose, though not expressly authorized by statute.

APPLICATION for a writ of mandate to require the respondent, as State Treasurer, to pay the interest on certain bonds, as evidenced by coupons attached thereto. In pursuance of law, a levee district was organized in Sutter county, in the year 1871, and designated Levee District No. 5. Thereafter, works of reclamation were commenced and carried on in the district and large expenditures of money were thereby made, amounting to five hundred thousand dollars, for which warrants were duly issued. Under the Act of March 30, 1872, "To provide for funding the indebtedness of the reclamation and levee districts of the State" (Stat. 1871-2, p. 835), the warrants so issued were funded in bonds of the district of five hundred dollars each, bearing interest at the rate of eight per cent. per annum, payable on the first day of January and July of each year. The bonds were prop-

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erly numbered, dated and sealed, and were signed by the Reclamation Fund Commissioners, as provided in the said Act, and had coupons for the interest attached to each bond. The President of the Fund Commissioners caused a *fac simile* of his autograph to be printed on the coupons, and adopted the printing as his signature, instead of writing his name with his own hand. The bonds so issued were received by the creditors in satisfaction of the warrants held by them. By the Act of March 25, 1872, amendatory of the Act of 1872, *supra* (Stats. 1873-4, p. 585), it was provided that the assessments collected for the payment of the principal and interest of the bonds should be paid to the State Treasurer, in the same manner as other taxes, to constitute an interest and sinking fund, from which the State Treasurer was authorized and directed to pay the interest and principal of the bonds as they become due.

The petitioner, being the holder of a bond on which the interest for six months became due July 1, 1874, presented to the respondent the coupon representing the interest, and requested payment thereof, there being sufficient money in the fund for that purpose. The respondent refused to make the payment, on the ground that the name of the President of the Fund Commissioners had been printed upon the coupon, and not written with his own hand. Thereupon the petitioner made this application.

I. S. Belcher, for the Petitioner, argued that the *fac simile*, having been printed by direction of the President of the Fund Commissioners, and adopted by him as his signature, was a legal signing of the coupon. He cited *Davis v. Shield*, 26 Wend. 352; *James v. Patton*, 6 N. Y. (2 Seld.) 13; *Miller v. Pilliton*, 4 Edw. 102; Benjamin on Sales, 191-2; 3 Phillips on Ev. (4 Am. ed.), 371; Brown on Stat. of Frauds, sec. 356. He also referred to the custom of signing the coupons of railroad bonds and other bonds, bank notes and the United States legal tender notes by printed *fac simile*.

Attorney-General Love, for Respondent, contended that

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to constitute a legal signature, there must be an actual writing of the name of the signer; and he referred to the definitions of the words "signature" and "to sign" in the dictionaries of Webster, Worcester, Bouvier, Wharton and Burrill. A printed *fac simile*, he said, could be more easily forged than an autograph; and such a signature would be no more protection than no signing at all. He contended that a *fac simile* could not be adopted as a signature without express authority of law, and that in the instances referred to by counsel for petitioner, the legal tender notes and bank notes, the statute had authorized the use of the *fac simile*.

The Court ordered the mandamus to issue as prayed for.

[No. 4,469.]

DINAN v. STEWART.

NOTICE OF APPEAL.—A notice of appeal given before July 1, 1874, was required to be filed on the same day it was served.

IDEM.—The question whether the amendment to section nine hundred and forty of the Code of Civil Procedure, which went into effect July 1, 1874, changed the rule in this respect, not decided.

DISMISSAL OF AN APPEAL.—If an appeal is ineffectual from failure to file and serve the notice on the same day, a motion to dismiss the same will be denied.

MOTION to dismiss an appeal, on the certificate of the Clerk below, from a failure to file the transcript within the time required by the rules of the Court.

By the Court, WALLACE, C. J.:

It appears by the certificate of the Clerk of the Court below, filed here in support of the motion to dismiss the appeal, that the notice of appeal was filed on the 28th day of April, 1874, but was not served on the respondent's attorney until the 1st day of May, 1874.

Points decided.

In *Columbet v. Pacheco* (46 Cal. 650), we held that, under section nine hundred and forty of the Code of Civil Procedure, it was necessary to the taking of an appeal, that the filing and service of the notice should be effected on the same day. It appearing, therefore, that no appeal has been taken in this case, the motion to dismiss the appeal must be denied.

The amendment to section nine hundred and forty of the Code of Civil Procedure, if it changed the rule in this respect, did not take effect until July 1, 1874, and, therefore, does not apply to this case.

Motion denied.

[No. 4,048.]

JOHN F. CUTTER v. M. J. HARDY, C. P. MOORMAN, SUSAN E. HARDY, LUCY F. CUTTER, KATE H. GAGE, C. M. GAGE, MARY C. CUTTER, WILLIAM P. CUTTER AND SALLIE H. CUTTER.

CONSTRUCTION OF WILL.—C., in his will, devised a portion of his property to trustees in trust, to be held and managed for the benefit of a son, in such manner as the trustees should judge for the interest of the son; and to pay over to the son such part of the income as they might think best, until he arrived at the age of thirty years, and then, if they thought he possessed such habits of prudence and economy as to render it proper, to transfer it to him, but otherwise to retain it in trust, and still manage it for his benefit; and at his decease, if still in their hands, to transfer it to his heirs:

Held, that the son, by the devise, took no interest in the property which he could assert in an action against the trustees, even after he arrived at the age of thirty years, and that the title to the property vested in the trustees.

Held, further, that the trust was valid in law, and that its duration could not extend beyond the life-time of the son, and might terminate sooner, if, in the opinion of the trustees, it was prudent to transfer the property to the devisee.

APPEAL from the District Court, Twelfth Judicial District, City and County of San Francisco.

Statement of Facts.

John H. Cutter, a resident of New Hampshire, was, and had been for many years, the owner of a trade-mark used to designate a certain brand of Bourbon Whisky, which was sold by him throughout the United States. On the 29th day of October, 1859, he made a will, in which he nominated executors, and also appointed three trustees. After several special devises, he made the following general devise:

“All the rest, residue and remainder of my estate, personal, real and mixed, I give, devise and bequeath in manner following, to wit: two nineteenths thereof to my son, William P. Cutter, his heirs and assigns forever; fifteen nineteenths thereof to my five daughters, each an equal proportion, and to their heirs and assigns forever; and the other two nineteenths thereof to my said trustees, in trust, to be held, invested and managed for the benefit of my son, John F. Cutter, in such manner as they shall judge to be most for the interest of my said son, until he shall arrive at the age of thirty years, and to pay over to him or expend for him the income, or such part thereof as said trustees shall deem necessary or suitable until he shall arrive at the age of thirty years; and then I desire and direct my said trustees to pay over and transfer to him the said two nineteenths, and the increase, if any thereof, if in their judgment and belief the said John shall be in a condition, and possess such habits of industry, prudence and economy, as to render it suitable, proper and expedient that he shall have the control and management of his own property, to hold to said John, his heirs and assigns; but if my said trustees should be of a different opinion and belief, I hereby order and direct them to retain the said share of the said John, still in trust for him, and the same to invest and husband, and of the income, principal and estate to pay to him and transfer to him, in part or wholly, as they shall judge to be for the best interest of my said son, in accordance with justice and prudence, and considering his habits, capacity and prospects in life. The foregoing portion, put in trust for my said son, John F., is for him, his heirs and assigns,

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subject to the trust; and at his decease, if still in the hands of the trustees, to be paid and transferred to his heirs and legal assigns.

“I empower the survivor or survivors of my said trustees, to act in all the matters of trust herein contained, if any one or more of them shall decease.

“In testimony whereof, I hereunto set my hand and seal, and publish and declare this to be my last will and testament, in the presence of the witnesses named below, this 29th day of October, in the year of our Lord, 1859.

“JOHN H. CUTTER, [SEAL.]”

The testator died on the 7th day of July, 1860. The plaintiff was twenty-two years old at the time of the death of his father, and was thirty-three years old when this suit was commenced, to-wit: in 1871. The will was probated and letters issued to the executors, and the administration was closed, and the executors discharged, before this action was commenced. The plaintiff averred in his complaint that defendants Hardy and Moorman were the trustees appointed in the will; that the trade-mark was a part of the assets of the estate, and that the trustees had seized on the trade-mark, and had been, since the death of the testator, and then were, using the same, and that they excluded him from all profits arising from the enjoyment of it, and were appropriating to their own use the profits arising therefrom, and that the annual profits arising from the use of the same were twenty-five thousand dollars. He asked that said defendants account to him for two ninetieths of the profits they had realized. The other defendants were heirs, and were made defendants under an allegation in the complaint that the plaintiff had requested them to join with him as plaintiffs, and they had refused. On the trial, when the plaintiff had rested, the Court granted a nonsuit. The plaintiff appealed.

W. H. Rhodes, for the Appellant.

The trust became an executed one in Cutter, at the age of thirty years. (2 Wash. on Real P. p. 436; 3d Ed. 169-70; 2 Flint R. Prop. 802.)

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The executory devise, made dependent on the will or opinion of the trustees, is void. Cutter took the fee, or the whole interest at the age of thirty years. (4 Kent Com. 271, note *a*; *Hone v. Van Schaik*, 7 Paige, 221; 20 Wend. 564; *Yates v. Yates*, 9 Barb. 347; *Kevy v. Rundle*, 15 Barb. 139.)

The direction for accumulation of the rents and profits or income, is void by our statutes. (1 Civil Code, 218, Art. 724, 225; *Boynston v. Hoyt*, 1 Denio, 53.)

The trust would be void at common law, and executed, under the Statute of Uses, of Henry VIII. (1 Preston on Estates, 190; 1 Horne & H. Rep. 389; 4 Kent Com. 304, note *c*.)

A. Campbell and W. H. Patterson, for the Respondents.

By the COURT:

The answer denies that the trade-mark in controversy has, at any time, been part of the assets of the estate of J. H. Cutter, deceased, and denies the allegation that the said decedent bequeathed any interest in the trade-mark to the plaintiff. Under the terms of the will of J. H. Cutter, deceased, the plaintiff took no interest in the property capable of assertion in this action. The title to the two undivided nineteenthths of the trade-mark in controversy is vested in the trustees named by the testator. Nor can there be any doubt that the trust in this respect is valid in point of law. Its duration cannot, under any circumstances, exceed the life-time of the plaintiff; and upon the happening of the contingency named in the will it may terminate sooner. For these reasons we think that plaintiff was correctly nonsuited at the trial, and the judgment is affirmed.

Remittitur forthwith.

Statement of Facts.

[No. 2,956.]

THE VALLEJO LAND ASSOCIATION v. ELIAS VIERA.

MORTGAGE IN FEE.—A mortgage in fee is, for the purposes of the statute which provides that if any person shall convey any real estate by conveyance, purporting to convey the same in fee simple, an estate subsequently acquired by the grantor shall pass to the grantee, a conveyance in fee.

DECREE ENFORCING MORTGAGE.—When the mortgage conveys the estate in fee simple absolute, a decree enforcing the same is, in effect, a decree that the estate vested in the mortgagor at the date of the mortgage, as well as that which shall at any time come to him, be sold, and the Sheriff's deed to the purchaser operates to transfer to such purchaser the estate so directed to be sold.

SHERIFF'S DEED ON MORTGAGE SALE.—The rule that a Sheriff's deed, delivered upon execution sale, transfers to the grantee only such estate as, at the time of sale, was held by the defendant in the execution, has no application to a Sheriff's deed made under a decree enforcing a mortgage in fee.

ESTOPPEL BY MORTGAGE.—A mortgagor, who mortgages in fee, is estopped from denying that the estate mortgaged was other or less than an estate in fee simple.

MERGER OF MORTGAGE IN DECREE.—A mortgage, although in some sense merged in the decree, remains a muniment of the title which passes to the purchaser at the mortgage sale, to be looked to, not only for the purpose of ascertaining the time at which the mortgage lien attached, but also (in the absence of express directions in the decree limiting the estate to be sold) the estate conveyed by way of mortgage.

APPEAL from the District Court, Fifteenth Judicial District, County of Contra Costa.

Ejectment to recover about one hundred and twenty-six acres of land, part of the so-called Suscol Ranch, in the county of Solano. M. G. Vallejo claimed about eighteen leagues of land, called the Suscol Rancho, under an alleged Mexican grant, but the Supreme Court of the United States, in 1862, rejected the grant, and the land became a part of the public domain. (See *United States v. Vallejo*, 1 Black. 541.) Vallejo, before this rejection, had sold the land, or a great portion thereof, to parties who had enclosed and improved the same. Congress, on the 3d of March, 1863 (12 U. S. Statutes at Large,

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p. 808), passed an Act, by which those who had purchased from Vallejo, or his assigns, were allowed to preëempt and purchase from the United States the land to the extent to which they had reduced the same to possession at the time of the decision. The demanded premises were conveyed by Vallejo to J. B. Frisbie, and by Frisbie to the defendant, by deed bearing date September 1, 1861. Viera entered into possession, and afterwards preëmpted and purchased under said Act of Congress, and received his patent from the United States in the spring of 1867. When Viera bought of Frisbie, he gave the latter a mortgage, to secure a part of the purchase-money. Frisbie assigned the mortgage to F. D. Atherton, who, on the 19th day of December, 1862, obtained a decree enforcing the same. The decree merely directed the Sheriff to sell the premises, or so much thereof as might be necessary, with the usual other clauses in such decrees. Under this decree, the Sheriff sold, and Atherton became the purchaser, and the Sheriff gave him a deed on the 31st day of July, 1865. Atherton sold to Frisbie, October 10, 1865, and Frisbie conveyed to the plaintiff, December 1, 1868. The plaintiff was a corporation. October 2, 1865, the defendant took a lease of the premises from Atherton for the term of two years and eleven months. He remained in possession from the time he purchased from Frisbie. The plaintiff recovered judgment and the defendant appealed.

The other facts are stated in the opinion.

John Currey and M. A. Wheaton, for the Appellant.

The plaintiff claims that the title acquired by the defendant in 1867, by virtue of his patents, has passed to, and vested in the plaintiff by operation of law, and this on account of the mortgage made and foreclosed, whilst the title remained in the government.

It will be admitted, we presume, or if it is not, it is well established by authority in California, that without our statute, none of the forms of conveyance now in use, unaccompanied by covenants of warranty, would operate to pass an after-acquired title.

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“They pass only the estates which are invested in interest at the time, and do not bind or transfer, by way of estoppel, future or contingent estates.” (*Clark v. Baker*, 14 Cal. pp. 627, 628, 629, and the numerous authorities there cited.)

Here, the execution of the mortgage, its foreclosure and the Sheriff's deed were all before the title was acquired from the government. That the mortgage operated upon whatever Viera had or owned in the land at the time it was executed and foreclosed, we will not dispute, but that it operated to pass any title acquired subsequently, and after the date of the Sheriff's deed, we deny.

At the date of the foreclosure, Viera had no inchoate rights; the Suscol Act had not been passed, giving him permission to preëempt this land. The foreclosure was in December, 1862, and the possession, by virtue of which he preëmpted, was in February, 1862, but the right to preëempt on account of that possession did not attach until the date of the Suscol Act, March 3d, 1863.

The thirty-third section of our Statute of Conveyances operates to pass an after-acquired title to the grantee in a deed where the grantor purports to convey the land in fee-simple absolute, not having the legal estate, but afterwards acquires it. And we are aware that this section has been construed to embrace a mortgage so far as to prevent the mortgagor from setting up an after-acquired title to defeat the enforcement by foreclosure of the lien created by the mortgage. But it has never been claimed, even so far as we know, that it would prevent the mortgagor from setting up and holding title acquired after foreclosure.

The real question is, does a Sheriff's deed, following a foreclosure of a mortgage, operate to pass an after-acquired title? That a Sheriff's deed does not pass an after-acquired title, and that the thirty-third section of our Statute of Conveyances has no application to such a deed, has been held in several recent cases in this Court. (*Montgomery v. Whiting*, 4 Cal. 293-4; *Kenyon v. Quinn*, 41 Cal. 325, and *Emerson v. Sansome*, 41 Cal. 552.)

These cases establish, beyond question, the rule of this

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Court in reference to the effect of a Sheriff's deed or the title of a judgment-debtor, where it follows a sale under execution. The deed, in such cases, passes the title held by the judgment-debtor at the date of the levy of the execution, and that acquired subsequently and before the sale, but the judgment-debtor is not precluded from afterwards acquiring and holding title adverse to that passed by the deed.

But the plaintiff here assumes that a Sheriff's deed following a mortgage and foreclosure carries with it something more than an ordinary Sheriff's deed, that it has some peculiar attribute derived from the mortgage itself. We fail to see the distinction. The sale is preceded by a lien created by the mortgage in the one case, and by a lien created by a judgment, duly docketed, or execution levied in the other case; and in neither case does the lien operate to change title before the sale.

"A mortgage creates a specific lien on the land mortgaged, as a judgment duly docketed, does a general one, on the land of the judgment-debtor. But the mortgagee, as such, has no title to the land mortgaged; he has neither *jus in re* nor *ad rem*, but a mere security for his debt; title to the land, notwithstanding, remaining in the mortgagor." (*McMillan v. Richards*, 9 Cal. 409; see, also, pp. 410, 411, 412.)

"The estate of the mortgagor and of the judgment-debtor, after the sale, stand upon the same footing. * * * The decisions as to the estate of the judgment-debtor, after sale, become, therefore, authorities for determining the estate of the mortgagor, after sale, under decree." (*Id.* 412.) In both cases, the title, whatever it is, remains in the mortgagor or judgment-debtor, until the deed passes it, and it only passes title then vested.

In *San Francisco v. Lawton*, (18 Cal. 465,) the effect of a mortgage upon an after-acquired title is fully discussed, and it is there held, after reviewing the case of *Clark v. Baker*, (14 Cal.) (Judge FIELD wrote the opinion in both cases,) that a mortgage operates, except in a single instance, only upon the estate mortgaged, or held by the

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mortgagor at the date of the mortgage. The exception is, where the mortgagor, after the execution of the mortgage, but before foreclosure, acquires additional title, which inures, by way of estoppel, to the benefit of the mortgagee; and, in that case, the sale under the foreclosure decree, passes the title to the same extent as if originally held by the mortgagor.

Indeed, so far as we have been able to learn, it has never before been claimed in this Court that a mortgage or decree, and foreclosure under it, could, by any possibility, pass any title not in the mortgagor at the time of foreclosure and date of the Sheriff's deed.

The very able counsel who argued the case of *Clark v. Baker*, in this Court, whilst contending for the doctrine that the mortgage operated to convey an after-acquired title, say, "if obtained before foreclosure," thereby showing that they did not even pretend that such would be the case, if the title had been acquired subsequent to foreclosure and sale. (14 Cal. p. 621.)

There is no warranty of title in the mortgage. (*Peabody v. Phelps*, 9 Cal. 228.) "What is sold is not the interest of the mortgagee, but the estate of the mortgagor." (*Haffley v. Maier*, 13 Cal.) "Where a decree of foreclosure is rendered, the contract ceases, being merged in the decree." (*Aldrich v. Sharp*, 3 Scam. 261; *Wayman v. Cochrane*, 25 Ill. 152; *Hobby v. Pemberton*, Dudl. Geo. 212.)

W. H. Wells, S. G. Hilborn and Beatty & Denson, for the Respondent.

The mortgage in this case purports to convey the land in dispute in fee simple absolute, with an ordinary defeasance, as is usual in mortgages. Under the terms of this mortgage any after-acquired title (if indeed Viera did not at the time have title) would pass to the mortgagee or the person purchasing at the mortgage sale. (See *Clark v. Baker*, 14 Cal. 618.)

This mortgage, by operation of law, is a mortgage with full warranty of title. And the warranty in the mortgage

is, according to the decision in the above quoted case, to have the same effect as if in a deed. But, says the appellant, this implied warantee is to have full and complete effect as long as the mortgage is in force; but when the mortgage is merged in a judgment and sale, then the warranty ceases to have any operation. In effect, when a mortgagor warrants the title to land he is mortgaging, he only warrants the title for his own benefit, not that of the mortgagee. As long as the title is in the mortgagor the warranty is good. When the mortgagee enforces his lien and vests the title in himself by purchase at Sheriff's sale, the covenant is gone. This doctrine is certainly a novel one. It is the case of a man making a deed of warranty directly to himself. "I, A. B., bargain, sell and convey Black Acre to myself; covenant with myself to warrant and defend the title in myself forever; but upon express condition that this covenant shall not run with the land to any holder by descent or purchase from myself." The value of such a deed we are unable to appreciate.

Whatever covenants of warranty are contained in a mortgage pass under a decree of foreclosure to the purchaser at Sheriff's sale, whether that purchaser be the mortgagee or another. (*Andrus v. Walcot*, 16 Barb. 21; *McCrady v. Brisbane*, 13 Ind. 193; *Tufts v. Andrus*, 1 N. & McC. 104; 8 Pick. 547.)

By the Court, WALLACE, C. J.:

The action is ejectment, and the premises sued for are a portion of the Suscol Ranch. The asserted legal title of the plaintiff originates in a Sheriff's deed, delivered in 1865 to a purchaser at a judicial sale held upon a decree of foreclosure, regularly entered in an action instituted against the defendant here. The decree was founded upon a mortgage deed executed by the defendant to Frisbie in 1861, to secure a balance of unpaid purchase-money — the defendant, at the time, receiving from the mortgagee a conveyance whereby he obtained the asserted title of General Vallejo to the mortgaged premises.

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In February, 1862, this title of Vallejo was finally rejected in the Supreme Court of the United States, and in the following month of December the decree of foreclosure was entered against the defendant, directing that the mortgaged premises be sold to satisfy the principal debt owing by the defendant, with the interest accrued thereon, and that the purchaser receive a Sheriff's deed, and be let into possession, etc. In 1863 Congress passed the Act for the relief of the purchasers from Vallejo, and in 1867 the defendant, under the provisions of that Act, as being a purchaser from Vallejo, and in possession when the title of the latter was rejected, obtained for himself the patent from the United States, purporting to convey to him the premises in controversy; and he now relies upon this patent as vesting in him the legal title, in defense of the present action. The mortgage-deed delivered by the defendant, and through the foreclosure of which the plaintiff's title comes, purports, upon its face, to convey the premises by way of mortgage in fee; its language is: "Hath granted, bargained, sold, aliened, released, conveyed and confirmed, and by these presents doth grant, bargain, sell, alien, release, convey and confirm unto the said party of the second part, and to his heirs and assigns, forever, all that certain piece or parcel of land, situate," etc.

The action, as we have remarked already, is ejectment, and the legal title must, of course, prevail. It is conceded that the legal title is that title which is derived through the patent of the United States of the year 1867, running to the defendant Viera on its face; and the general question for determination is, whether, in point of law, that title is, under the circumstances, to be considered as vested in the plaintiff or in the defendant.

The thirty-third section of the statute of this State concerning conveyances is as follows: "If any person shall convey any real estate by conveyance purporting to convey the same in fee simple absolute, and shall not, at the time of such conveyance, have the legal estate in such real estate, but shall afterward acquire the same, the legal estate subsequently acquired shall immediately pass to the grantee,

and such conveyance shall be valid as if such legal estate had been in the grantor at the time of the conveyance." The thirty-sixth section of the same Act provides that the term "conveyance," as used in the Act, shall be construed to embrace any instrument in writing by which any real estate or interest in real estate is created, aliened, mortgaged or assigned, with certain exceptions not material now to notice.

In short, a mortgage in fee is, for the purposes of the statute, a conveyance in fee. It was so held in *Clark v. Baker*, (14 Cal. 612,) when the question was first presented for consideration, and the ruling in that case has been followed here in the subsequent cases in which the point was involved. (*Clark v. Boyreau*, 14 Id. 634; *San Francisco v. Lawton*, 18 Id. 465; *Kirkaldie v. Larrabee*, 31 Id. 455.) The mortgage-deed to Frisbie, purporting, as it does, to convey the fee, is to be read as if it were written upon its face that the mortgagor, Viera, thereby mortgaged not only all the estate which he then held in the mortgaged premises, but all the estate therein which he might at any time thereafter acquire. (*Clark v. Baker*, *supra*, 630.) This interpretation of the statute is made necessary, in order to give force to its provisions, that "such conveyance shall be valid as if such legal estate had been in the grantor at the time of the conveyance," and to its further provision that the legal estate subsequently acquired by the grantor "shall immediately pass to the grantee." The consequence attributed by the statute to a conveyance in fee by way of mortgage is, as against the grantor and his privies, similar to that following upon a fine levied at common law, when resorted to as a mode of assurance, which operated to transfer to the conusee the entire estate, present or future, vested or contingent.

Upon this view it follows that the decree of foreclosure entered upon the mortgage executed by Viera, and directing a sale of the mortgaged premises, was, in effect, a decree, that the estate of the mortgagor in those premises, vested in him at the time of the execution of the mortgage, or which should at any time thereafter come to him, be sold

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to satisfy the mortgage debt, and that the Sheriff's deed, delivered to the purchaser at the sale, operated a transfer of the estate so directed to be sold. The mortgage-deed, though in some sense merged in the decree, remains a muniment of the title which passed to the purchaser at the mortgage sale, and to be looked to, not only for the purpose of ascertaining the point of time at which the mortgage lien attached, but also (in the absence of express directions in the decree limiting the estate to be sold) the estate purporting thereby to have been conveyed by way of mortgage, as being in fee or otherwise.

The rule that a Sheriff's deed delivered upon execution sale imports no warranty of title, but transfers to the purchaser only such estate as was held at the time by the defendant in execution, has no practical application to a Sheriff's deed delivered upon foreclosure of a mortgage in fee; for, as we have seen already, the defendant in the latter case must continue to be estopped, by the terms of the mortgage-deed itself, to deny that the estate was other or less than an estate in fee in the premises. These terms, importing a conveyance of the fee, are equivalent to a covenant of general warranty of title running with the land. We are, therefore, of opinion that the plaintiff is vested with the legal title to the premises in controversy, and that the judgment below should be affirmed.

This view renders it unnecessary to consider the questions made upon the effect of the lease of the premises afterwards accepted by the defendant from Atherton, the purchaser at the foreclosure sale.

Judgment and order denying a new trial affirmed.

Mr. Justice RHODES dissented.

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[No. 4,121.]

MARIE DE LAURENCEL AND ANGLIQUE DE LAURENCEL, BY GUSTAVE DUSSOL, THEIR GUARDIAN, v. ROMAIN CORNEILLE DE BOOM, ALBERT DE BOOM, URSULE VAN BRANTEGHEM, FANNY DE BOOM, LOUISE VICTORINE BOUSCATIER, LEON LEGAULT, MARIE LEGAULT, LEON DE LAURENCEL, AND THE SPRING VALLEY WATER WORKS.

WHEN A LEGATEE BECOMES A TRUSTEE.—If the testator, after making a will in which he devises all his property absolutely, writes a letter to the legatee, stating the trusts upon which the testator intended to devise the estate, and explaining how the legatee was to execute the trusts, and the legatee, during the life-time of the testator, accepts in writing the terms of the trust, and promises to execute it faithfully, a trust is created as expressed in the letter, and a Court of equity will compel the legatee to execute it.

APPEAL from the District Court, Fourth Judicial District, City and County of San Francisco.

Jean Corneille De Boom resided in the city of Paris, Republic of France, and was the owner of an undivided one half of real estate in the city and county of San Francisco, and also owned two hundred and fifty shares of the stock of the Spring Valley Water Works, a corporation which supplied the city and county of San Francisco with pure water. On the 4th day of December, 1869, said Jean Corneille made his will, which was executed according to the law of California concerning wills, in which he devised all of his property to his nephew, Romain Corneille De Boom. On the day of the execution of the will, the testator wrote a long letter of instructions to the legatee. The letter was dated "Paris, 4th of December, 1869," and was addressed, "To my nephew Romain Corneille De Boom." This letter of instructions recited all the property which the testator owned, both in Europe and California, and stated the income derived from it, and explained how the income was to be used for ten years after the testator's death; and in-

Argument for Appellant.

structed said Romain how to dispose of the property, and to whom to distribute it, and for whom he was to hold it in trust. The letter of instructions made provision for the testator's servants, and made the children of a sister and of a brother heirs. At the bottom of the letter was the following writing, signed by the legatee:

"I have read this letter, written and signed by my uncle, Jean Corneille De Boom, dated Paris, fourth December, eighteen hundred and sixty-nine, and, being as a codicil to the will executed the same day in my favor, I bind myself to execute faithfully the last wishes of my uncle expressed in this codicil at the Chapelle en Serval, eighteenth of August, one thousand eight hundred and seventy-one."

The testator died at Paris on the 21st day of September, 1870. The will was probated in the City and County of San Francisco, and after administration, the property in California was distributed to the legatee Romain Corneille De Boom. The plaintiffs, who were minors, were daughters of a sister of the testator, and were made two of the heirs in the letter of instructions. They commenced this suit by their guardian, on the 22d of September, 1872. The complaint was in equity, and alleged a trust; and that the legatee, Romain, denied the trust and claimed the ownership in his own right of all the property, and was about to sell it, or a part of it, and asked that the legatee be compelled to execute the trust, and that he be enjoined from selling the trust property. A preliminary injunction was issued, which the defendant, Romain Corneille, moved to dissolve. The Court below denied the motion, and said defendant appealed from the order refusing to dissolve. The other defendants, except the Spring Valley Water Works, were heirs under the letter of instructions; some of whom lived in Europe, and who were made defendants because their consent to be made plaintiffs had not been obtained.

T. H. Rearden and John F. Finn, for the Appellant.

The instrument, in no sense, creates a trust cognizable by a Court of equity.

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It was not in existence at the date of the will to which it is claimed to be supplementary; and is not referred to in the will in any manner.

The will bears date December 4th, 1869. The letter of instructions also bears date December 4, 1869, but was not completed on that day, and the declaration of the defendant bears date August 18, 1871.

In England, prior to 1837, when written wills of personal property were not required to be attested by witnesses, the Courts were inclined to hold any informal instrument executed by the testator with reference to the testamentary disposition of his personal estate as a will or codicil to a will of personal property, or as charging the legatee named in the will with the execution of a trust; but the Statute I., (Will IV., Ch. 40,) passed 1837, assimilated wills of real and personal property in the matter of ceremonial of execution, requiring the attestation of two witnesses to all wills; and under that statute, which is virtually the same as was the statute of our own State in the present case, all attempts to alter, or in any way to affect the disposition of property made in a will by any instrument not executed in conformity with the statute, and not referred to in the will, have failed.

Lewin, in his work on trusts, states the law and the reasons for it as follows:

“We must bear in mind that the absolute owner of property continues in himself both the legal and equitable interest; and when the Legislature enacts that no devise or bequest of property shall be valid without certain ceremonies, a testator cannot, by an informal instrument, affect the equitable any more than the legal estate, for the one is a constituent part of the ownership as much as the other.

* * If it be said that such expression of intention, though void as a devise or bequest, may yet be good as a declaration of trust, and, therefore, that where the legal estate of a freehold is well devised, a trust may be engrafted upon it by a single note in writing, the answer is, that a wide distinction exists between testamentary dispositions and declarations of trust. The former are ambulatory until the

Argument for Respondents.

death of the testator; but the latter take effect, if at all, at the time of the execution.

“And Mr. Justice BUTLER observed, in *Habergham v. Vincent* (2 Ves. Jr. 209), ‘a deed must take place upon its execution, or not at all; it is not necessary for a deed to convey an immediate interest in possession; but it must take place as passing an interest to be conveyed at the execution; but a will is quite the reverse, and can only operate after death.’

“We may, therefore, safely assume as an established rule, that if the intended disposition be of a testamentary character, and not to take effect in the testator’s life-time, but ambulatory until his death, such disposition is inoperative, unless it be declared in writing, in strict conformity with the statutory enactments regulating devises and bequests.”

And any papers made after the execution of the will, must be so executed that they may be probated as a revocation of the will, or as a codicil thereto, or they will have no effect. (Lewin on Trusts, 2d Am. Ed. Sec. 66; Perry on Trusts, Secs. 92–3; *Adlington v. Cann*, 3 Adk. 151 *Briggs v. Penny*, 3 De G. and Sm. 547; *Johnson v. Ball*, 5 Id. 85.)

Edward J. Pringle, for the Respondents.

The trust is established by the declaration in writing signed by the appellant. To this the appellant’s only answer is the citation of cases to the effect that the instrument declaring the trust is no part of the will of the testator. Of course not. The trust is created by the declaration and subscription of the trustee, not by the declaration or subscription of the testator.

The will operates to vest the fee in the devisee, as a deed absolute on its face would do. The simultaneous or subsequent declaration of trust by the devisee is no more a part of the will or required to be executed by the testator as a will, than a declaration of trust by a grantee is required to be expressed in the deed by which the fee is carried to him.

If any consideration were needed to sustain the declaration of trust it is found in the manifest reliance by the tes-

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tator, upon the promise of the devisee. But no consideration is necessary to a declaration of trust in writing signed by the trustee. (Perry on Trusts, Secs. 82 and 96.)

In all the cases cited by the appellant, as in all cases we have found bearing on the question, the discussion assumes, as settled law, the validity of a declaration of trust signed by the party to be charged. And the cases go so far as to charge a party as trustee without his declaration, where he has accepted the trust under circumstances which would make it fraudulent for him to deny the trust. None of the cases or text-books doubt, that where he has signed a declaration, he is chargeable. The Court will find such to be the recognized law in the appellant's own case. (*Johnson v. Ball*, 5 De Gex and Smale, 85; also in the following: Perry on Trusts, Sec. 94. *Russell v. Jackson*, 10 Hare's Rep. 204; *Briggs v. Penny*, 8 Eng. Law and Eq. 232; *Strickland v. Aldridge*, 9 Vesey, Jr., 517; *Tee v. Ferris*, 2 Kay and Johnson, 357.)

The mistake of the appellant is in supposing that we are attacking the will, or varying the terms of it. We do not do so. The will has taken effect without disturbance, and has vested the legal title in the devisee. Now, we simply claim to affect him with the trust with which he has charged himself, by his written declaration, sufficient under the Statute of Frauds.

By the COURT:

The letter from the testator, Jean Corneille De Boom, dated on the same day on which the will was executed, and directed to the defendant, Romain De Boom, the sole devisee under the will, explains the trust upon which the testator intended to devise the estate; and we are of opinion that when the defendant, during the life-time of the testator, accepted, in writing, the terms of the trust, and bound himself to execute it faithfully, this created a valid trust, which a Court of equity will enforce. The presumption is, that the testator would have revoked or modified the will, except for the fact that the defendant, by a solemn instrument, ac-

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cepted the trust, and promised to execute it. It would be a fraud upon the testator and upon *cestui que trusts* to permit the defendant to repudiate the trust, on the faith of which the estate was devised to him.

Order refusing to dissolve the injunction affirmed.

[No. 3,837.]

IN THE MATTER OF THE APPLICATION OF THE CLEAR
LAKE WATER COMPANY.

ASSESSING DAMAGE FOR TAKING PRIVATE PROPERTY.—Where Commissioners are appointed to assess compensation for the taking of private property for public uses, and it is claimed that the Commissioners have not assessed "compensation for each piece of land taken, and for each source of damage, separately," an objection to the action of the Commissioners on that ground must be taken before the Commissioners themselves, to afford them an opportunity to obviate the objection; and if they refuse, an exception must be noted. If the party fails to make the objection before the Commissioners, he cannot move to set aside the report on that ground, in the Court to which the report of the Commissioners is made.

APPEAL from the County Court, City and County of San Francisco.

The case was thus: The Clear Lake Water Company was incorporated for the purpose of supplying the people of the city and county of San Francisco with pure, fresh water. The company, on the 24th of December, 1866, filed a petition in the County Court of the City and County of San Francisco to condemn the "Laguna de la Merced" and a belt of land three rods wide meandering the entire circumference of the lake, "including all the lands and waters within those boundaries, and the springs and streams which empty into the same." A large number of persons were named in the petition, as owning, or claiming, an interest in the property sought to be condemned. A time was set for hearing the petition, and notice was served on those named in the petition. Commissioners were then appointed to assess compensation to the parties owning the

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property. The Commissioners having taken testimony, on the 15th day of March, 1873, filed their report, in which they assessed as compensation to be paid the gross sum of two million two hundred and fifty-one thousand three hundred and seven dollars. The petitioner moved the County Court to set aside the report, but made no objection before the Commissioners. The County Court granted the motion, and from this order the claimants appealed.

The other facts are stated in the opinion.

Sol. A. Sharp, for the Appellant.

Charles N. Fox, for the Respondent.

By the Court, WALLACE, C. J.:

The report of the Commissioners was set aside by the Court below, "for the reason that the same is informal and is not made in compliance with the requirements of the law in this, that the said Commissioners have not assessed compensation for each piece of land taken and for each source of damage separately as required by statute."

If an objection of this character had been taken before the Commissioners and an exception reserved, a motion might have properly been made by the petitioners to set aside the report for the reason assigned. But no such objection or exception before the Commissioners is pointed out by counsel or found on the record. The Act of March 9, 1870 (Stats. 1869-70, page 227), provides, in substance, that a motion to set aside a report in such a case as this must be based upon some exception reserved before the Commissioners, and that upon the hearing of the motion, "the entire report of the Commissioners, including the testimony and exceptions, shall be deemed a statement on such motion and may be used and read thereon." It was the intention of the Legislature that a party proposing to object to the mode of procedure pursued by the Commissioners, should first make his objection to the Commissioners themselves, and thus afford them an opportunity to obviate it, if possible; and should they refuse to

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do so, to then put his objection and exception of record, and on return of the report to renew his objection by means of a motion made to set aside the report. But he cannot be permitted to state his objection for the first time in making the motion to set aside the report. In this case, for instance, the statute required the Commissioners to assess the compensation for each piece of land taken, and for each source of damage separately, "as far as practicable." It was not objected before the Commissioners that this portion of the statute was being disregarded by them. No motion was made by the petitioners to make the proceedings more specific in these respects. It is only now that the report has been filed and the proceedings are approaching a finality that the objection is, for the first time, taken by motion of the petitioner to set aside the report. The motion should not, under these circumstances, have been entertained.

Order reversed and cause remanded. Remittitur forthwith.

Mr. Justice CROCKETT, being disqualified, did not participate in the decision.

Mr. Justice MCKINSTRY did not express an opinion.

[No. 4,167.]

**WILLIAM FITZPATRICK BY JOHN FITZPATRICK
AND J. M. HAVEN, HIS GUARDIANS, v. A. HIMMEL-
MANN.**

OFFICE OF TRIAL JURY.—It is the office of a trial jury, by their verdict, to find the facts in issue, whether general or special, and with the legal effect of those facts they have no concern.

DISSENT OF JUROR FROM VERDICT.—Although a juror may, at the last moment, dissent from a verdict rendered, yet that dissent must be founded on the question of fact presented by the verdict, and not upon information received from the Court, as to what is the legal effect of the verdict as found.

VERDICT OF JURY.—If the jury have special issues submitted to them, and find on these issues, and also find a general verdict for the plaintiff; and

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when the verdict is read, the Court declares that on the findings the defendant must have judgment, and some of the jury then dissent from the special verdict, and the Court sends them out for further deliberation, and they then return with general verdict, but are unable to agree on the special verdict, the Court should not accept the general verdict.

APPEAL from the District Court, Fourth Judicial District, City and County of San Francisco.

The defendant appealed.

The other facts are stated in the opinion.

Wm. Irvine, for the Appellant.

Thomas V. O'Brien and Gray & Haven, for the Respondent.

By the Court:

The jury were instructed to find a verdict in response to certain special issues submitted to them by the Court. They did so, and at the same time found a general verdict in favor of the plaintiff. Upon their appearance in the court-room with these verdicts the Court remarked: "I suppose there must be a judgment in favor of the defendant on these findings;" and thereupon some of the jurors, declaring their dissatisfaction with their special verdict, they were sent out for further deliberation. They subsequently reported to the Court that, while they adhered to their general verdict in favor of the plaintiff they were unable to render any verdict upon the special issues. Thereupon the Court below, against the objections of the defendant, withdrew the special issues from the consideration of the jury, and, accepting the general verdict, rendered a judgment thereon in favor of the plaintiff.

It is apparent that the general verdict rendered under such circumstances should not have been accepted by the Court below.

It is the office of a trial jury by their verdict, whether general or special, to find the facts in issue between the parties; with the legal effect of those facts, as resulting in a

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judgment in favor of the one party or the other, they have no concern whatever.

While it is undoubtedly competent to a juror to declare, even at the last moment, that the verdict, as presented, is not his verdict, his dissent must proceed upon the question of fact determined by the verdict. He is not at liberty to dissent merely because he mistook the legal effect of his verdict, or ascertains from the remark of the Court that the judgment to be rendered upon the verdict will be other than he had supposed.

The proceedings in this case, upon the return of the jury into Court, plainly show that they would have adhered to their special verdict, if they had not accidentally found out that judgment would be rendered for Himmelmann instead of Fitzpatrick, and their general verdict rendered for the latter, under such circumstances, ought not to have been received, or made the basis of a judgment in the cause.

Judgment and order reversed, and cause remanded for a new trial.

[No. 4,148.]**SAMUEL F. GEIL v. ELISHA STEVENS.**

SHERIFF'S FEES FOR KEEPING PROPERTY.—A Sheriff is not entitled to keeper's fees, or the expense of feeding stock under attachment, unless the Court from which the writ issues certifies that the charges are just and reasonable.

APPEAL from the District Court, Twelfth Judicial District, City and County of San Francisco.

Thomas Watson was Sheriff of Monterey County. The defendant Stevens procured a writ of attachment against the property of one Billings, which was placed in the hands of Watson, as Sheriff, on the 3d day of December, 1869. He attached horses and mules, and charged keeper's fees, and the expenses of feeding the animals in a stable. His bill for these services was assigned to the plaintiff, who brought this action to recover the same. No certificate

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was procured from the Court that the charges were reasonable. The Court below granted a nonsuit, and the plaintiff appealed.

Barstow and Stetson & Houghton, for the Appellant.

The right of a Sheriff to recover for his necessary fees in taking and caring for property attached in a case, at the request of plaintiff, is not a statutory right, and it is only when a new right is created by statute, and the same statute prescribes a particular remedy for its recovery, that the remedy pointed out must be strictly pursued.

Independent of the statute, he could, as bailee, recover in a suit at law. (Story on Bailments, sec. 131; Crocker on Sheriffs, secs. 371 and 824; *Smith v. Birdsall*, 9 Johns. 327; *Eastman v. The Coos Bank*, 1 N. H. 26; *Tarbell v. Dickinson*, 3 Cush. 345.)

When a remedy is given by an affirmative statute, a remedy previously existing at common law is not taken away, unless prohibited by express words. (Sedgwick on Stat. and Con. Law, p. 39, and cases cited.)

W. H. Patterson and Joseph P. Phelan, for the Respondent.

By the Court:

By the statute (Sec. 2,803 Hitt. Gen. Laws) the Sheriff is allowed certain designated fees, and he is also allowed "such further compensation for his trouble and expense in taking possession of property under an attachment or execution, or other process, and preserving the same as the Court from which the writ or order may issue shall certify to be just and reasonable." We think that in the absence of the required certificate, the Sheriff is entitled to nothing more than the fees enumerated in the statute, and cannot legally claim the "further compensation" sought to be recovered in this action.

Judgment and order affirmed.

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[No. 3,959.]

CORNELIUS K. GARRISON v. CORNELIUS MCGOWAN AND MARCUS A. EDMONDS.

ATTORNEY AT LAW.— If a person has been admitted to practice as an attorney at law in another State, and has been accustomed to practice here, and been recognized by the Courts and bar here as a member of the bar, he is, *de facto*, an officer of the Court in this State, and the validity of his acts as an attorney cannot collaterally be called in question.

IDEM.— The entry of the appearance of a defendant by such attorney is of the same effect as though the attorney had been admitted to practice in the Courts of this State.

ENTERING APPEARANCE BY ATTORNEY AT LAW.— If an attorney at law, who has no authority to do so, enter the appearance of a defendant in an action without the service of process, and the fact of the want of authority is made to appear, the entry of the appearance is void.

RELIEF AGAINST JUDGMENT RENDERED ON APPEARANCE BY AN ATTORNEY.— The presumption is that the attorney who enters the appearance of a defendant, without service of process, was authorized to do so, and one who seeks relief in equity from a judgment rendered against him, on an appearance entered by an attorney, must make out a clear case of want of authority in the attorney, and must show clear merits, and take prompt action.

PRESUMPTION THAT ATTORNEY WAS EMPLOYED TO ENTER AN APPEARANCE.— If an agent of an absent defendant has been in the habit of employing an attorney at law for the absent defendant, and has paid him for services out of the funds of such defendant, and such defendant was in the habit of leaving the conduct of his suits with such agent, the presumption is that an appearance entered by such attorney for said defendant was by authority.

THE plaintiff was and had been for many years a resident of the City of New York, and was the owner of a lot at the intersection of Drumm and Washington streets, San Francisco, of the value of about forty thousand dollars, having several buildings upon it, which were rented to tenants. In 1865, the plaintiff appointed Martin R. Roberts his attorney in fact, by a power in writing, which was acknowledged, giving his attorney power to rent his property, execute leases, collect rents, and to take general charge and control of his houses and lands, and to collect all sums due the plaintiff in California. The power was recorded on the 20th day of October, 1865. The plaintiff, on the 31st day of March, 1870, revoked the power to Roberts, and by another

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power in writing appointed O. C. Pratt his attorney in fact, with full power to act for the plaintiff in all matters pertaining to the plaintiff's interests in California. The latter power was likewise recorded on the 23d day of June, 1870. On the 10th day of June, 1870, Roberts surrendered up to Pratt the agency. On the 19th day of July, 1869, the Board of Supervisors of the City and County of San Francisco passed a resolution declaring its intention to order a redwood sewer to be constructed in Washington street, from Drumm to East street, and such proceedings were afterwards had that the contract to construct the same was awarded to defendant McGowan, on the 16th day of August, 1869. McGowan performed the work, and an assessment of six hundred and sixty dollars and forty-three cents was levied on the plaintiff's lot for the same. On the 14th day of February, 1870, the assessment not having been paid, McGowan, by Hale and Edmonds (defendant Edmonds), his attorneys, brought suit against Garrison to enforce a lien on the lot for the assessment. The summons was not served, and, on the 12th day of April, 1870, H. K. Moore signed an appearance for the defendant, of which the following is a copy:

" C. MCGOWAN

v.

" C. K. GARRISON.

}
}

" I hereby appear as attorney for the defendant, C. K. Garrison, in the above-entitled cause, to defend the same for him.

" H. K. MOORE,

" Defendant's Attorney.

" San Francisco, April 12th, 1870."

The appearance was filed with the Clerk on the 16th day of July, 1870. No answer or demurrer was filed; and, on the 26th day of August, 1870, Hale & Edmonds gave written notice to Moore that they would, on the 2d day of September, 1870, apply to the Court for final judgment. On the 5th day of September following, the Court rendered a final judgment enforcing the lien, and directing a sale of

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the property. The Sheriff sold the property under the decree, on the 4th day of October, 1870; defendant Edmonds became the purchaser for the sum of eight hundred and nine and two tenths dollars; being the amount of the judgment, interest and costs; and on the 25th of April, 1871, received a Sheriff's deed. On the 11th day of September, 1871, the Sheriff's deed was recorded. The plaintiff alleged in his complaint, that he did not know of the suit or proceedings until the 21st day of September, 1871.

This was a suit in equity to have the judgment in *McGowan v. Garrison* vacated, and to have the defendant Edmonds enjoined from setting up, or asserting title under the Sheriff's deed, and to compel him to convey the property to Garrison.

The plaintiff, in his complaint, did not aver that the assessment was not legally or justly due; or that there was any informality in the proceedings under which it was levied; or that he had any defense to the action of *McGowan v. Garrison* if the judgment was vacated, but offered to pay, and brought into Court the full amount of the judgment, all costs and interest, and an additional sum for expenses of attorneys, etc. There were allegations in the complaint of collusion between Moore and Edmonds, concerning the notice of appearance and default; but these allegations were denied in the answer. The Court below rendered a judgment vacating the judgment of *McGowan v. Garrison*, and enjoining Edmonds from setting up title to the property, and directing him to execute a conveyance to Garrison. The defendants appealed.

The other facts are stated in the opinion.

J. P. Hoge and *J. F. Reynolds*, for the Appellants.

Moore was employed and appeared in virtue of his employment. He had been admitted to the bar in New York, and was a practicing lawyer here. He was uniformly recognized as a member of the San Francisco bar, and, if not actually, formally admitted and licensed in our Courts; the fact was not suspected, even by himself. He only discovered the fact when the discovery became important, as he supposed, in the prosecution of this suit.

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But it is not important. Attorneys from other States, when sufficiently distinguished, or personally known to the Court, are often permitted to practice in our Courts, *ex gratia*, without a formal admission. It is a mark of distinction; and no one ever suspected that, in such cases, the acts of counsel, so practicing, were not binding on their clients. It might be otherwise if there were no employment. But Garrison is bound by the employment. (*Lawson v. Bettison*, 7 Eng. 413-417.) And not merely by his employment in the McGowan suit, but by his previous employment, which had then been constant and uninterrupted for the space of two years. Under our statutes, it is a matter entirely between the Court and the person acting as an attorney, whether he shall practice without a license. If he does so, the Court may punish him for contempt. But our statutes have never gone beyond that. (Hittell, Art. 398, Code C. P. 281.)

The statutes (2 Geo. 2, Ch. 23, Secs. 17, 24; 22 Geo. 2, Ch. 46, Sec. 11; 37 Geo. 3, Ch. 90, Secs. 30, 31,) imposed penalties on persons practicing without admission; and further, under 37 Geo. (Ch. 90, Secs. 30, 31,) attorneys who failed to take out their certificates, were declared incapable of practicing. Yet a plaintiff, whose attorney had not taken out his certificate, did not even lose his costs. (*Reeder v. Bloom*, 3 Bingham 9, 10.)

And in another case, the person acting as attorney was not an attorney at all—his name was not on the rolls—yet the Court refused, at the instance of the opposite party, to set the proceedings aside on that ground. (*Harding v. Purkiss*, 2 Marsh. 228, 229.)

A party cannot have relief in equity against a judgment, "who gives no reason why in equity he ought not to pay it." (*Stokes v. Knarr*, 11 Wis. 391; *Ableman v. Roth*, 12 Id. 91; *Gregory v. Ford*, 14 Cal. 142, 143; *Gibbons v. Scott*, 15 Id. 286; *Borland v. Thornton*, 12 Id. 440, 445-8; *Secor v. Woodward*, 8 Ala. 501; *Crafts v. Dexter*, 8 Id. 767; *Lawson v. Bettison*, 7 Eng. 417; *Irby v. McCrae*, 4 Dessau Eq. 428-9; *Walker v. Robbins*, 14 How. (U. S.) 584; *Shottenkirk v. Wheeler*, 3 Johns. Ch. 280; 2 Sto. Eq. secs. 898, 1570, et

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seq.; *Simpson v. Simpson's Ex.* 3 Litt. 141, 147; *Patterson v. Matthews*, 3 Bibb, 80, 81; *Warner v. Conant*, 24 Vt. 353; 854.)

And the rule is so well settled that it is applied to attorneys as well as other agents. When they have been actually employed, their omissions are as binding as their acts, and their negligence will preclude relief in equity in all cases, unless excused. And like that of the party himself, the negligence of the attorney or agent can only be excused by the act of the opposite party, or by inevitable accident. (*Burton v. Wiley*, 26 Vt. 430, 432; *Lawson v. Bettison*, 7 Eng. 413-417; *Stokes v. L. and S. T. Co.* 6 Humph. 248; *Jones v. Williamson*, 5 Cold. Tenn. 371; *Barrow v. Jones*, 1 J. J. Marsh. 471; *Jones v. Pitt's Heirs*, 3 Litt. 427, 430; *Quinn v. Wetherbee*, 41 Cal. 247; *Jamison v. May*, 8 Eng. 608; *White v. U. S. Bank*, 6 Hammond, 530; *Green v. Dodge*, Id. 80; *Dorflinger v. Coil*, 2 Id. 311, 312; *Green v. Robinson*, 6 How. Miss. 80.)

No excuse is shown for not paying the judgment which does not rest exclusively in the negligence of Roberts or Pratt. No accident is shown or averred.

The neglect of a party's own agent is the neglect of the party himself. (Story on Agency, sec. 452.)

A principal is responsible to third persons for the negligences and even the frauds of his agent; (*Id.*; *Bank U. S. v. Davis*, 2 Hill, 462-464,) and cannot, of course, shield himself behind such negligence when it results in loss to himself. This is well settled; and it is on this principle that notice to an agent is held to be notice to the principal, because the latter cannot be heard to assert his agent's neglect of duty, as against an innocent third party. (*Bierce v. Red Bluff Hotel Co.* 31 Cal. 165; *Bank U. S. v. Davis*, 2 Hill, 461-464; *Merch. Bank v. Seton*, 1 Peters, 309.) And hence the neglect of an agent entrusted with the defense of a suit will preclude relief in equity, in the same manner as the neglect of the party himself.

Moore was the attorney of record, and the only one on whom notice could be served. Notice served on Pratt would have been null and void, and might have been dis-

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regarded. Edmonds had agreed with Moore to give him notice before entering a default, and had a right to insist on serving the notice on the attorney of record. (*Grant v. White*, 6 Cal. 55; *Parker v. Williamsburgh*, 13 How. Pr. R. 250, 251; *Jerome v. Boeram*, 1 Wend. 293, 295; *United States v. Curry*, 6 How. U. S. 106, 111; Hittell, Art. 400, 401; 1 Grah. Prac. 22, 23; 1 Tidd's Practice, 108, 94.)

T. H. Rearden, for the Respondent.

Attorneys are officers of the Court, and can only appear for and represent parties by its license. (*Clark v. Willett*, 35 Cal. 539.) In the modern English decisions, a distinction is made where the attorney appears without authority, between cases where defendant has and where he has not been served. (See *Bayley v. Buckland*, 1 Exch. 1 Wels. H. & G. 1, 1847; 16 L. J. N. S. Exch. 204.) "If," says the Court, "the process has been served, and the plaintiff be innocent of any fraud or collusion and the attorney is responsible, the party for whom the attorney appeared is confined to his remedy against him." The reason given, is that the plaintiff is without blame, and the defendant is guilty of negligence by not appearing and making defense by his own attorney, if he has any defense on the merits. But, on the other hand: "If the plaintiff, without serving the defendant with process to appear, accepts an appearance entered for him by an unauthorized attorney and proceeds to judgment, the Court will set aside the judgment with costs, and leave the plaintiff to recover by summary proceedings against the delinquent attorney those costs and the expenses to which he has been put by him." "The plaintiff in such case is not wholly free from the imputation of negligence; the law requires him to give notice to the defendant by serving the writ, and he has not done so. The defendant, therefore, is wholly free from blame, and the plaintiff not."

The distinction taken is a reasonable one; and, on principle, and in view of the tendency of modern judicial opinions, the true rule of law is thought to be that a party not

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served, who has been represented by an unauthorized attorney, has a right to be relieved against the judgment on motion or by bill in equity, and this right does not depend upon the ability of the attorney to respond in damages. The judgment of *McGowan v. Garrison* was absolutely void for want of all jurisdiction in the Court which rendered it. Garrison was not served with process, nor did any attorney of the Court appear for him. Moore's appearance, he being at the time only a private person, and not an attorney, could neither affect or bind any one. Hence the judgment entered by default against Garrison was a nullity, and could neither legally affect his person or property, and, it became the duty of the Court to so adjudge when proof was made that its action and decree were not supported by jurisdiction obtained over either.

By the Court, WALLACE, C. J.:

1. There is not even the slightest evidence of fraud upon the part of Moore nor of Edmonds, nor, indeed, of any other person, in the proceedings resulting in the judgment in favor of McGowan and against Garrison. Edmonds, as the attorney of McGowan, had no relations with Garrison, nor with Pratt, his agent, which involved the duty upon his part, to consult with the latter or give him any special notice of the pendency of the suit of McGowan against Garrison. That duty belonged to Moore, who was the attorney of record for Garrison in that action, and Moore testified that he distinctly notified Pratt (who had, in the meantime, become the agent and attorney in fact of Garrison,) of the pendency of the suit of *McGowan v. Garrison*, and that this notice was given before the sale of the property had taken place, and in ample time to have prevented the sale. Moore was cross-examined by Pratt, at the trial, and being inquired of as to the fact of his having given him this notification, said: "I went to your office; I opened the door and went in. You were standing by the table talking with a gentleman. I mentioned to you there was the suit of *McGowan v. Garrison*, a street assessment suit, which ought to

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be attended to. You stopped me, put your hand up, and said, 'I know all about it; I will attend to it.' That is all you said, sir, and I went out." If, as Pratt testifies, he did not comprehend the import of this distinct notification given him by Moore, that circumstance would not tend to show that Moore was acting fraudulently or in bad faith in attempting to bring the matter to his attention. That Pratt did not understand Moore is rather to be attributed to a possible indisposition upon his part to listen, as he testifies that at that time, for particular reasons he "did not wish to have any particular conversation with Mr. Moore beyond what was actually essential." Moore certainly seems to have done his whole duty in giving, or endeavoring in good faith to give, information to Pratt, which, had it been listened to, would have protected Garrison from the subsequent loss of his property.

2. Moore, although he had not in fact been admitted to practice in the Courts of this State, by order entered in the usual manner, had been regularly admitted an attorney and counselor of all the Courts of the State of New York, at a general term held in the city of New York on the 25th day of November, 1862, and might have been admitted to practice in the Courts of this State upon motion. This motion he believed had been made, and the usual order of admission obtained; and, acting upon that belief, he had been accustomed to appear in the Court below as an attorney and counselor, conducting business there without challenge or question from any quarter. He had been habitually recognized by the Court as a member of its bar. He was, therefore, in any view, *de facto*, an officer of the Court, and the validity of his acts as to third persons cannot collaterally be called in question. The appearance of the defendant, entered by Moore as his attorney, in the action of *McGowan v. Garrison*, must be regarded, therefore, as of the same import, in all respects, as though Moore had been admitted to practice in the Court below by the entry of the usual order of admission.

3. If an attorney at law, having no authority to do so, enter the appearance of a defendant in an action without

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the service of jurisdictional process, and the fact of the want of the authority be made to appear, such proceeding is void as to the defendant, whose appearance has been so entered.) But the act of the attorney in entering the appearance of a defendant, carries with it a presumption of due authority upon his part to do so. Therefore, if, after an appearance entered, judgment be rendered against the defendant, and the latter seeks relief against the judgment on the ground of want of authority of the attorney to enter his appearance, it is incumbent upon such party "to make out a clear and unmixed case." He is required "to show clear merits; to take prompt action, and to establish his right by cogent and strong evidence." There would, indeed, be but little security afforded by judicial proceedings had, if a party who had been unsuccessful in litigation could overthrow or defeat them upon mere suggestion of want of authority in his attorney to appear for him, or to conduct the controversy upon his behalf; and it would, from the nature of the case, usually be a work of much difficulty for the opposite party to show the authority, even if it existed. It is apparent that the proof upon the part of Garrison here was not sufficient to overcome the presumption of authority in Moore to enter his appearance as a defendant in the action brought by McGowan. There is really no proof whatever that Moore did not have the requisite authority in that behalf. Roberts, who had long been the attorney in fact of Garrison in California, had been accustomed, in other cases, to employ attorneys about the business of Garrison, and Moore was one of the attorneys who had been thus employed.

4. To say that he had no authority to employ Moore as an attorney for his principal in the McGowan suit is to ignore a uniform course of business pursued by Roberts for a number of years, with the knowledge, and at least the tacit approval of Garrison. Roberts had during the time repeatedly engaged the services of Moore about the law business of Garrison; had paid him with the funds of Garrison for his services in such business, and to this course of business the latter had never made an objection. It ap-

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pears to have been the habit of Garrison to leave the general conduct of the suits in California with Roberts, as his agent. This is the purport of Roberts' testimony at the trial, and it is uncontradicted. Moore himself testified that in all cases (including, of course, the case of *McGowan v. Garrison*) in which he had appeared for Garrison, he was employed to do so by Roberts, the agent of Garrison. In fact, the evidence given at the trial, so far from displacing the presumption of the rightful authority of Moore to appear, directly establishes the fact of his employment by Roberts for that purpose, and that the latter had the requisite authority from Garrison in the premises.

Judgment and order denying a new trial reversed, and cause remanded for a new trial. Remittitur forthwith.

Neither Mr. Justice CROCKETT nor Mr. Justice McKINSTRY expressed an opinion.

[No. 3,625.]

SIMON THOMPSON, W. G. MORRIS AND ROBERT SHEEHY v. ELIJAH TRUE.

TITLE OF STATE TO SIXTEENTH AND THIRTY-SIXTH SECTIONS.—An Act of Congress, passed after March 3, 1853, permitting the purchasers from the claimant of a rejected Mexican grant, to enter the land included within the boundaries of the grant; at one dollar and twenty-five cents per acre, does not divest the State of its title to the sixteenth and thirty-sixth sections within the grant; and a patent issued by the United States under said Act, to one of such purchasers, of a sixteenth or thirty-sixth section, does not convey the title.

ESTOPPEL BY JUDGMENT.—If the matters determined by a judgment against a defendant are set forth in the complaint, the question, as to whether the defendant is estopped by it, arises on the complaint.

REFERENCE OF LAND CONTEST TO DISTRICT COURT FOR TRIAL.—If an application is made to the Register of the State Land Office to purchase land, and a protest is filed on the ground that the State has no title, and that the title is in the protestant, and that he has the better right to purchase, and a contest arises before the State Register, which he refers to the District Court for trial, and an action is commenced in the District Court, it has jurisdiction to determine the question whether the State has title to the land.

Statement of Facts.

ESTOPPEL BY JUDGMENT IN CASE OF CONTEST TO PURCHASE LAND.—If a party makes an application to the Register of the State Land Office to purchase a sixteenth or thirty-six section of public land, and one who has obtained a patent to the land from the United States files a protest, claiming that the title is not in the State, and that he has the better right to purchase, and the contest is referred to the District Court for trial, and the District Court adjudges that the title to the land is not in the State, and that neither party has a right to purchase the land from the State, and the applicant afterwards obtains a patent from the State, the applicant is estopped by the judgment from averring that the patent from the State vested in him the title to the land, and from denying that the patent issued by the United States transferred to the patentee the title to the land, and the patent issued by the State is void.

PATENT TO LAND IN THE SUSCOL RANCH.—Although the Act of Congress granting the right to purchasers from Vallejo, of land on the so-called Suscol Ranch, to purchase from the United States, does not expressly provide for a patent to issue to the purchaser; still a patent must issue, as the usual mode of transmitting the legal title. The patent issued by the United States to a purchaser of land which was a part of the so-called Suscol Ranch, cannot be attacked by a private person on the ground that the patentee had not the requisite possession to entitle him to purchase under the Suscol Act, unless such person connects himself with the title to the land.

APPEAL from the District Court, Seventh Judicial District, County of Napa.

The case was thus: M. G. Vallejo claimed that a large tract of land had been granted to him by the Mexican government before the acquisition of California by the United States, and applied to the Board of Commissioners, appointed by the United States, to have the alleged grant confirmed. It was called the Suscol Rancho. The case was appealed to the Supreme Court of the United States, and, in 1862, that tribunal decided that the grant was invalid. A large number of persons had purchased from Vallejo before the grant was rejected, and had enclosed and cultivated their respective parcels of land. Congress passed an Act, approved March 3, 1863, extending the public surveys over the Ranch at the expense of the settlers, and permitting the *bona fide* purchasers from Vallejo to purchase the land from the United States at one dollar and twenty-five cents per acre, to the extent to which

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the same had been reduced to possession at the time of the adjudication of the Supreme Court. This action was brought to quiet the title to the southwest quarter of section thirty-six, excepting therefrom a piece containing about fifty-nine acres. The land was within the boundaries of what had been called the Suscol Ranch. The plaintiffs had been in possession of the land since 1855. The land was surveyed in 1863, and the plat filed in November of that year. On the 20th day of May, 1867, the United States, under the Suscol Act, granted a patent to the land in dispute, along with other lands, to the plaintiffs Thompson and Sheehy, and the grantors of the plaintiff Morris. The patentees presented their claim under the Act of Congress, within twelve months after the approved plats of the survey were filed in the Land Office. On the 21st day of April, 1864, the defendant applied to L. Ransom, the State locating agent, to locate and purchase from the State said southwest quarter, the application was accepted and approved by the Surveyor-General of California on the 28th day of February, 1868, and the defendant demanded a certificate of purchase. The plaintiffs Thompson and Sheehy, and the grantors of plaintiff Morris, filed a protest, and the Register of the State Land Office referred the contest to the said District Court for trial. On the 6th day of April, 1870, the District Court rendered the judgment mentioned in the opinion. (See *Sheehy v. True*, 45 Cal. 236.) On the 10th day of December, 1870, the defendant applied to the Register of the State Land Office for a certificate of purchase, and the Register, notwithstanding the judgment of the District Court, gave him a certificate, and afterwards a State patent was issued to him.

Judgment in this case was rendered in favor of the plaintiffs September 12, 1872. The transcript does not show when the action was commenced, but it shows that it must have been commenced after the State patent was issued. The defendant appealed.

The other facts are stated in the opinion.

Catlin & McFarland and *George Cadwalader*, for the Ap-

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pellant, argued that the land was not excluded from the grant of the sixteenth and thirty-sixth section made by the Act of March 3, 1853, by the following reservation in the Act:

“That where any settlement, by the erection of a dwelling-house or the cultivation of any portion of the land, shall be made upon the sixteenth and thirty-sixth sections before the same shall be surveyed, or where such sections may be reserved for public uses, or taken by private claims, other lands shall be selected by the proper authorities of the State in lieu thereof.” (10 U. S. Statutes, 246.)

That the words “private claim,” in the reservation, applied only to a settlement made under the preëmption law of 1841. They also argued that the defendant, being in privity with the source of paramount title, because he claimed from the United States through its grant to the State, had a right to dispute the plaintiff's title and attack their patent; and that their patent was void because there was no law authorizing it to be issued as the Suscol Act did not provide for a patent; and cited *Patterson v. Winn*, 11 Wheat. 380. They also argued that the judgment of the District Court, in case of *Thompson v. True*, was not an estoppel, because in said action the defendant did not have the title which he now set up, to wit: The State patent; and because the plaintiffs failed to get the judgment they sought, to wit: The right to purchase from the State.

Thomas P. Stoney and *Hartson & Burnell*, for the Respondents, argued that the judgment in *Morris et al. v. True*, was an estoppel and decisive of the whole case, because it was decided by the District Court:

1st. That the State of California had no title to the southwest one quarter of section thirty-six.

2d. That the plaintiffs in this action had acquired the title from the United States under their Suscol Patent.

3d. That consequently the Register of the State Land Office should deny defendant's application for a certificate of purchase.

That the Court, having decided that the State had no

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title to convey, it was a useless enquiry whether one party or the other had the right to a certificate of purchase from the State. As to the jurisdiction of the District Court to pass on the question of title, they made the following argument:

It is provided in section twenty-seven of the Act of April 27, 1863, (Statute 1863, p. 599,) that "in all cases where a contest shall arise for the approval of a survey or location before the Surveyor-General, or for a certificate of purchase or other evidence of title before the Register, that officer shall, when such contest is a question as to the survey, or purely a question of fact, determine the same according to the facts, and give his approval or issue the certificate of purchase, or other evidence of title, as he may so determine."

The jurisdiction of the Court will depend upon the issue in the Land Office. If the want of title in the State was a legitimate ground of controversy in the Land Office, and its assertion created a contest such as the Act of the Legislature contemplated, then, undoubtedly, the Court had jurisdiction to decide that issue. Did the assertion of title in themselves, and denial of title in the State by the respondents, create a contest upon the application of appellant for a certificate of purchase?

In *Tyler v. Houghton*, (25 Cal. 30,) a mandamus was issued by this Court requiring the Surveyor-General to permit the petitioner to contest an application to purchase lieu lands under the Act of 1863. The petitioner did not claim the right to locate the land himself, but merely the privilege of contesting the right of the State to select the land. The Surveyor-General declined to allow the petitioner to contest on the ground that he was "not authorized to entertain a contest between parties who are not both applying for a purchase of the land."

The Court say: "We do not so read the statute. There is certainly no such restriction expressly imposed by the terms of the Act, and such a restriction is repugnant to the whole scope and design of the Act. The object of the Act, as expressed in its title, is to provide for the sale of lands

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belonging to the State. In order to effect this, it is of primary consequence to ascertain what land belongs to the State. When application is made for the purchase of any given parcel of land, it is of first importance alike to the interest of the purchaser and the State, to ascertain whether such land is subject to selection and location by the State. If it is not, the State can neither pass the title, nor can the applicant acquire any by the proposed action. It would be folly, therefore, on the part of the State and the purchaser to avoid any contest which might throw light upon the question of title. Clearly it is the policy of the Act in question to invite, rather than discourage contests of this kind. * * * * *

“In our judgment, it is made the duty of the Surveyor-General to hear and determine all contests which may be brought before him touching the right of the State to sell, or the applicant to purchase, in the manner prescribed in the twenty-seventh section of the Act.”

In the case of *Higgins v. Houghton* (25 Cal. 259), the protest was on the ground that the land was mineral land, and did not belong to the State. The signers of the protest had no interest in the land nor improvements, and had “no relations to the land except as ‘dwellers’ upon it at the point of time when the protest was signed,” and the Court say: “Still we consider the protestants as competent parties under the Act of 1863, to contest the plaintiff’s right to a patent.”

If, then, the want of title in the State was a legitimate ground of contest, as that contest involved a question of law which the Register could not decide, and, moreover, as the plaintiffs demanded that it be referred to the Courts, we see no way of avoiding the conclusion that the order of reference conferred jurisdiction upon the Court to determine that contest by an adjudication upon the question of title, as well as all other matters involved in it. (Act of 1863, Sec. 27, Statutes 1863, pp. 599, 600.)

Otherwise the law would encourage a useless controversy, and not only invite, but entertain a contest which it had provided no tribunal to decide. It certainly would not be

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maintained that the contest could be decided by the Court, but that the decision would not bind the State officers or parties.

This Court has, in the case of *Hinkley v. Fowler* (43 Cal. 56), had under consideration the jurisdiction of the Courts in the matter of contests, under the twenty-seventh section of the Act of 1863, and the conclusions of the Court are thus stated:

“Under the twenty-seventh section of the Act, when the contest is referred to the Courts for settlement, it is to be determined upon the principles of law and equity involved. The Court is to exercise its judicial authority in adjudicating the entire case as presented. It is not confined to the narrower measure of relief which the Surveyor-General, in the exercise of a mere *quasi* judicial function in determining mere matters of fact, might award. Such was not the intent of the statute. Its purpose was to provide for the settlement of the rights of the parties litigant at once and forever. The jurisdiction of the Court is as broad and effective as though one of the parties had already obtained a title to which the other had the better right. The Surveyor-General is to determine only those contests in which the survey, or purely a question of fact, is involved. But when a question of law only is involved, or one of law and fact, the parties are to be referred to the Courts for its determination, and in the Courts the ordinary rules of pleading and of evidence are to be observed, and judgment is to be rendered as in ordinary adversary proceedings.”

By the Court, RHODES, J.:

The land in controversy is a part of a thirty-sixth section, and by virtue of the Act of Congress of March 3, 1853, as we construed it in *Sherman v. Buick* (45 Cal. 656), the title vested in the State; and by means of the State patent, the title was transferred to the defendant, unless the operation and effect of the judgment in *Morris v. True*, which is set up in the complaint, precluded the defendant from relying on title derived from the State.

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It is unnecessary to notice any of the preliminary objections of the plaintiff, to the effect that the answer raises no issue as to the judgment in *Morris v. True*; and that in the motion for a new trial there is no specification which calls in question the implied finding in favor of the plaintiff upon the issue in respect to the judgment, for the matters determined by that judgment are set forth in the complaint, and thereupon the question arises as to whether the defendant is thereby estopped to aver title in himself derived through his patent from the State.

It is averred that the defendant made application to purchase the lands from the State; that the plaintiffs in that case filed with the Register of the State Land Office their protest, etc., on the ground that the title was vested in them, and that the State had no title; and on the further ground that they had the prior right to purchase the lands from the State. After stating that a contest arose before the State Register; that it was referred to the District Court; that an action was instituted, in which the defendant appeared, etc., it is averred that a judgment was duly made and entered, whereby it was adjudged that the legal title to the premises was vested in the plaintiffs, under their patent from the United States; that the State had no title or interest therein and that the defendant was not entitled to receive from the State Register a certificate of purchase. Upon looking into the judgment, it is found that in addition to the matters averred in the complaint, it is adjudged that neither party is entitled, under his application, to purchase the lands from the State; and that the defendant have judgment for his costs. After the entry of that judgment, the State Register issued to the defendant a certificate of purchase, and subsequently a patent was issued to him by the State.

The defendant contends that the Court had no jurisdiction to decide the question of title — that is to say, to determine whether the title had vested in the State — that the issue referred was necessarily confined to the question as to which of the applicants had the better right to make the purchase from the State. If this proposition be not sus-

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tainable — if the Court had jurisdiction to determine that the title was not in the State — the conclusion is irresistible that the determination of that issue is binding upon the defendant, and that he is now estopped to aver that the title had in fact vested in the State. If the Court possessed such jurisdiction the judgment was binding upon the officers of the State Land department, to the extent at least, that they had no authority to issue to either of the parties to that action a certificate of purchase or patent. *Tyler v. Houghton* (25 Cal. 26) was an application for a mandamus to compel the State Register to allow the petitioner to contest an application for the purchase from the State, of certain lands as lieu-lands; and it was held that the petitioner was authorized to contest the application, although he was not an applicant to purchase the lands from the State. And it was held that “it is of primary consequence to ascertain what land belongs to the State. When application is made for the purchase of any given parcel of land, it is of the first importance, alike to the interest of the purchaser and the State, to ascertain whether such land is subject to selection and location by the State.” That is to say, the issue as to whether the land was the land of the State, or was subject to selection and location by the State, was a material issue in the contest. That issue would, also, be a material issue in the action instituted in pursuance of the reference of the contest to the District Court. It is manifest, we think, that the Court would have no jurisdiction in a contest between two rival claimants for the purchase of the same land, unless the State had acquired the title, or, what amounts to the same thing, had taken such steps in the selection and location of the land, that the title would pass to the purchaser from the State. The issue of title in the State must, therefore, be a material issue, and no reason is perceived why its determination in a contest which the State Register referred to the District Court, should not be as binding and conclusive on the parties, as a similar determination in any other action between the same parties. It results from this construction of the effect of the judgment in *Morris v. True* that the defendant is estopped to

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aver that the patent issued to him by the State, vested in him the title to the land in controversy; and by means of the same judgment he is estopped to deny that the patent issued by the United States to the plaintiff, transferred to them the title to the premises.

It is urged by the defendant that the plaintiff's patent is void, as issued without authority of law. We are of the opinion, as stated in *Durfee v. Plaisted* (38 Cal. 83), that "the patent, although not expressly provided for in the Act, (The Suscol Act,) issues in pursuance of the entry as the usual, and perhaps the necessary mode, in the absence of any other provision for the transmission of the legal title to the purchaser." The proceedings under the Suscol Act had upon the plaintiff's application to purchase, and the patent issued to the plaintiff, if liable to attack by a private person on the grounds now urged by the defendant, that they did not have the requisite possession of any legal subdivision of the quarter section which includes the lands in controversy, and that they were not entitled to purchase under that Act, etc., cannot be attacked by the defendant, because he does not connect himself with the title to the lands in controversy.

Judgment and order affirmed.

Neither Mr. Chief Justice WALLACE nor Mr. Justice NILES expressed an opinion.

[No. 2,003.]

T. T. TIDBALL v. JOHN C. HALLEY, J. C. GOODS
AND E. D. SHIRLAND.

CONSTRUCTION OF PLEADING.—In an action against the sureties on an official bond, if the defendants allege in their answer, that they signed with the express understanding that the bond should be signed by certain other persons, naming them, without stating that this understanding was with the obligee, it will be presumed that the understanding was with the principal in the bond.

SURETIES ON AN OFFICIAL BOND.—If sureties on an official bond sign with an express understanding with the principal in the bond, that certain

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other persons shall sign as sureties, and that unless such other persons sign, it shall not be delivered, a delivery of the bond to the obligee, without the signature of such other persons, does not render it invalid as to the sureties who do sign.

DELIVERY OF BOND.—In an action on an official bond, the production of the bond in Court by the obligee, is sufficient evidence of its delivery.

DEPUTY COLLECTOR OF INTERNAL REVENUE.—A collector of internal revenue, for a district, must appoint his deputies by an instrument in writing, but need not assign a deputy to a portion of the revenue district by an instrument in writing.

APPEAL from the District Court, Fifteenth Judicial District, City and County of San Francisco.

The plaintiff appointed John C. Halley his deputy, October 1, 1868, and did not, in his written appointment, assign him to any particular portion of the district. The district of which the plaintiff was collector, included the counties of Alameda, Santa Clara, Santa Cruz, Monterey, San Luis Obispo, Santa Barbara, Los Angeles, San Bernardino and San Diego. The plaintiff verbally assigned Halley to the county of Alameda. The bond was signed by Halley as principal, and by Goods and Shirland, as sureties. They allege that it was understood that S. H. Foot, Joseph Davis and George Rolland should sign it before it was delivered. Halley, between the 12th day of October, 1868, and the 4th day of November, 1869, collected money which he failed to pay over, and this action was brought to recover it. The plaintiff had judgment for three thousand seven hundred and twenty-seven dollars and twenty-four cents. The defendants moved for a new trial, which was granted, and the plaintiff appealed from the order granting a new trial.

Moore, Laine & Lieb, for the Appellant.

For the sake of the argument we will concede that these sureties signed the bond upon the express understanding with Halley that two others were to sign it before delivery, and that Halley, in violation of that agreement and understanding, did deliver it to plaintiff.

This was wholly immaterial so long as the plaintiff was

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no party to that understanding, and took the bond in good faith; the authorities and the reasoning of the ablest jurists sustain us in this, and we shall content ourselves by citing the authorities, as we can hope to add nothing to the force of the reasoning of the cases we shall cite. They are cases decided by able jurists, and most carefully considered and fully discussed: *Deardorff v. Foresman*, 24 Ind. 481; *Blackwell v. Simpson*, 26 Ind. 204; *Webb v. Baird*, 27 Ind. 368; *York Co. M. F. Ins. Co. v. Brooks*, 51 Me. 506; *State of Maine v. Peck*, 53 Me. 284, and the cases cited in the foregoing authorities.

We know that there is a case opposed to our view of this matter, viz: *The People v. Bostwick*, 43 Barb. 10; 32 N. Y. 448. But this case is not supported by reason or authority, as shown very clearly in the cases cited by us *supra*, and especially in the case of *Deardorff v. Foresman*, 24 Ind. 481, and *State of Maine v. Peck*, 53 Me. 284. This last case most thoroughly reviewed the New York cases.

Armstrong & Hinkson, for the Respondents, argued that the delivery was fraudulent, and that the bond could not be enforced against the sureties who did sign; and cited *People v. Bostwick*, 43 Barb. 10; *The Hoboken City Bank v. Phelps*, 34 Conn. 102; *Johnson v. Baker*, 4 Barn. & Ald. 440; *King v. Smith et al.*, 2 Leigh, 157; *State Bank of Trenton v. Evans*, 3 Green, 155; *Fertig v. Bucher*, 3 Barr. 310; *Pawling v. The United States*, 4 Cranch, 219; *Ward v. Churn*, 18 Grattan, 801; *Smith v. South Royalton Bank*, 32 Vt. 347; *Fletcher v. Austin*, 11 Vt. 447; *Perry v. Patterson*, 5 Hump. 135; *The United States v. Liffer*, 11 Pet. 93, 94; *Parker v. Bradley*, 2 Hill, 584, and *Sharp v. The United States*, 4 Watts, 21.

By the Court, RHODES, J.:

The plaintiff, who was the Collector of Internal Revenue for the Second District of California, appointed Halley as his deputy; and the bond in suit, as it is alleged, was given for the faithful performance by Halley of his duties as such

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deputy. The sureties alone answer; and they allege, among other things, that their signatures to the bond were obtained with the express understanding that it should be signed by certain other persons named in the answer, and that, without such execution by those other persons, the bond was not to be delivered. It is not alleged that this "express understanding" was with the plaintiff, and the pleading will be construed as referring to the principal. It is not alleged that the plaintiff had notice of that understanding, or that there was anything which put him on inquiry; nor does the evidence in the case charge him with notice. The bond is in the following form:

"Know all men by these presents, that we, John C. Halley, of Alameda county, principal, and J. C. Goods, of Sacramento city, and E. D. Shirland, of Sacramento county, and —— of ——, as sureties, are held," etc. There is nothing on the face of the bond to give the obligee notice that it was intended to be executed by any other person than those whose names are subscribed to it. This presents the principal question in the case, which is, whether a failure to comply with such an understanding between the principal and sureties, as is alleged in this case, will defeat a recovery on the bond as against the sureties, when the obligee has no notice of such understanding, and no fact is brought to his attention sufficient to put him upon inquiry.

There is great diversity among the authorities on this question, and the cases on either side do not agree as to the reasons upon which the conclusion is based. We are of the opinion that *Dair v. United States*, 16 Wall. 1, and *State v. Peck*, 52 Me. 284, lay down the true rule on this subject; which is, that such facts as above stated will not defeat a recovery against the sureties. And this conclusion, we think, is sustainable upon principle.

No proof of the execution of the bond was required, as the defendants did not deny the allegation of the complaint that it was signed by them; and its production by the obligee is sufficient evidence of its delivery.

The tenth section of the Act of May 30, 1864 (13 U. S. Stat. at Large, 225), provides that a deputy-collector shall

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be appointed by an instrument in writing, but does not provide that the assignment of a portion of the revenue district to such deputy shall also be in writing; and, therefore, as we construe the statute, it was not essential that a written assignment of a portion of the district to Halley, as such deputy, be shown.

The other points do not require any particular notice.

Order granting a new trial reversed, and cause remanded.

Mr. Chief Justice WALLACE did not express an opinion.

[No. 3,361.]

THE ABBEEY HOMESTEAD ASSOCIATION v. A.
WILLARD.

EVIDENCE OF TITLE IN EJECTMENT.—On the trial of an action to recover the possession of land, the production by the plaintiff of a lease of the demanded premises, executed by him to the defendant, and signed by the defendant, the term of which expired before the commencement of the action, makes out a *prima facie* case of title in the plaintiff.

SPECIFICATION OF REASONS FOR NEW TRIAL.—If the defendant in ejectment moves for a new trial, and relies on the point that he was entitled to recover upon his evidence of adverse possession, he must include it in his specification of reasons why a new trial should be granted.

PROOF OF OUSTER IN EJECTMENT.—If the answer in ejectment denies an ouster, and the plaintiff fails to prove it, the defendant is entitled to a nonsuit. But if, in such case, the Court denies the nonsuit, and the defendant afterwards proves that he is in possession of the demanded premises, the error is cured.

EVIDENCE AFTER MOTION FOR A NONSUIT.—The Court may permit the plaintiff to introduce further evidence after a motion for a nonsuit is made; and unless the Court in doing so abuses its discretion, its action will not be disturbed.

LEASE, EVIDENCE OF TITLE IN THE PLAINTIFF.—In ejectment, the production of a lease executed by the defendant is *prima facie* evidence of title in the plaintiff, and is not overcome by evidence on behalf of the defendant that he was in possession when he executed the lease. The defendant must not only show possession, but paramount title, in order to overcome the estoppel created by the lease.

REBUTTING EVIDENCE IN EJECTMENT.—If the plaintiff in ejectment rests on proof of a lease executed by the defendant, and the defendant then proves adverse possession, the plaintiff, in rebuttal, may introduce evidence of the deraignment of his title.

Statement of Facts.

ADVERSE POSSESSION BY A TENANT.—The tenant cannot, during the term of a lease, hold adverse possession against the landlord by the mere intention so to hold, and without the doing of some act which would amount to adverse possession by a tenant who enters under a lease.

LEASE INTERRUPTS ADVERSE POSSESSION.—The taking of a lease by one in adverse possession, interrupts the running of the statute of limitations, and any subsequent adverse possession cannot be added to the time which had run prior to the lease.

EVIDENCE IN BILL OF EXCEPTIONS OR STATEMENTS.—When a statement or bill of exceptions is settled, it will be presumed that it contains all the evidence given in the cause which was necessary in order to explain the points specified, and that it would not have presented a different case in respect to the specified points, had it contained also the omitted evidence.

APPEAL from the District Court, Fourth Judicial District, City and County of San Francisco.

Ejectment to recover about one hundred acres of land, part of the Visitacion Rancho in San Mateo county. The answer denied the plaintiff's title, and also denied the ouster, and set up an adverse possession of five years. The action was commenced January 12, 1871. The plaintiff was a corporation, and on the trial introduced in evidence a lease of the demanded premises made by it to the defendant, and signed by the defendant, dated May 2, 1870, for the term of six months, reserving a rental of one dollar a month, and proved the value of the use of the premises from October 3, 1870, to the 11th day of January, 1871, and rested. The defendant moved for a nonsuit, because the plaintiff had failed to prove that he was in the possession of the premises when the suit was brought. The Court denied the motion, and then suggested that the plaintiff might prove that the defendant was in possession. The plaintiff thereupon recalled the witness before sworn, and examined him as to the defendant's possession, to which the defendant objected. The plaintiff again rested. The defendant was then sworn on his own behalf, and testified that when the lease was executed, he had been in possession of the demanded premises fifteen years, claiming the same in his own right adversely to the plaintiff and its predecessors and grantors, and that he was still in possession.

Argument for Appellant.

The defendant's counsel then offered to prove by him the matters stated in paragraph six of the opinion, but the Court refused to allow the evidence to be introduced. The defendant then rested. The plaintiff, in rebuttal, thereupon was permitted by the Court, against the objections of the defendant, to introduce in evidence a patent issued by the United States for the demanded premises to Henry R. Payson, dated December 15, 1865; a deed from said Payson to Albert Wheeler, dated March 3, 1853; a deed from Wheeler and his wife, to Jules B. Bayerque, dated November 17, 1857; a contract between said Wheeler and wife and Pioche, and the Visitacion Land Company, dated in May, 1867, agreeing to sell the land to said company; a deed from said Pioche and others to the Visitacion Land Company, dated May 15, 1870; and a written contract of said company to sell the land to Richard Blaikie, dated March 11, 1869, and an assignment of that contract to the plaintiff on the 17th of March, 1869. Plaintiff also introduced in evidence the will and probate proceedings in the matter of the estate of Jules B. Bayerque, and a deed by the executors of the will, conveying the land to said Pioche.

The plaintiff recovered judgment, and the defendant appealed from the judgment and from an order denying him a new trial.

Tully R. Wise and B. B. Newman, for the Appellant.

The Court erred in refusing to allow appellant to show under what circumstances he executed the instrument of lease under which plaintiffs claim an estoppel. (*Franklin v. Merada*, 35 Cal. 558; *Tewksbury v. Morgraff*, 33 Cal. 237.)

The plaintiff in this case cannot recover in this action, under the proof. The plaintiff does not hold, or pretend to hold, the legal title to the premises in dispute; all it does hold, or claim to have, is an agreement, by which the plaintiff "is entitled to the possession of the land described in the complaint." How entitled? Only, of course, as against the holder of whatever title Pioche, Wheeler and others held under the patent. As against them, plaintiff

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may be entitled to the possession, and only by virtue of their right; and if their right ceased, then plaintiff's right ceased also, for plaintiff claims only through them and through their title.

J. B. Felton and Jarboe & Harrison, for the Respondent.

Defendant might have shown that plaintiff had no title to the land in dispute. It was perfectly immaterial to show the intention of defendant in taking the lease, or whether he intended to abandon the land or not, or whether he received anything for the execution of the lease, or whether he paid any rent thereunder. Only the ultimate fact, *i. e.*, the fact that plaintiff had no title or right to possession of the demanded premises, would have availed defendant, and his offers were not broad enough to reach the fact.

By the Court, RHODES, J.:

Several questions of fact have been discussed by counsel which do not arise on this appeal. The only specification of the insufficiency of the evidence to sustain the decision which is to be found in the statement on new trial is the last, and it is as follows: "The evidence is insufficient to justify the decision in this, that the complaint alleges that plaintiff is owner in fee, while the evidence only shows that plaintiff had a contract to purchase the premises described in the complaint." This point cannot be sustained, for the plaintiff produced a lease of the premises, executed by him to the defendant for the term of six months, ending a few months before the commencement of the action. The lease made out a *prima facie* case of title in the plaintiff.

2. The point that the defendant is entitled to recover upon his evidence of adverse possession, cannot be entertained, because it is not comprehended in any of the specifications in the statement.

3. The motion for a nonsuit should have been granted. The answer denies that the defendant "ever ousted or ejected the plaintiff" from the premises; and the plaintiff failed to prove the ouster; but the defendant afterwards

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supplied the defect, by proving that he had remained in possession ever since the execution of the lease above mentioned. The production of that evidence cured the error.

4. The defendant urges that the Court erred in permitting the plaintiff to introduce further evidence, after the motion for a nonsuit was made. But that matter is committed to the discretion of the Court, and we see in it no abuse of discretion.

5. It is also urged that the Court erred in permitting the plaintiff to offer evidence of the deraignment of his title, after the defendant had closed. The plaintiff defends the action of the Court on the ground that the defendant, having relieved himself of the estoppel of the lease, by proving that he was in possession of the premises at the time of the execution of the lease, the burden of the proof of title was cast on the plaintiff. But this is not the rule. (See *Peralta v. Ginochio*, 47 Cal. 459.) The plaintiff was entitled to rely upon the lease as *prima facie* evidence of title, and this was not overcome by the mere fact that the defendant was in possession at its execution. The burden of proof was on the defendant to show paramount title in himself, or one under whom he claimed. But, in our opinion, the evidence was properly admitted in rebuttal — to overthrow the defense of adverse possession.

6. The defendant offered to prove that he executed the lease above mentioned for the sake of peace, "but not with the intention of surrendering his legal rights;" that he did not intend to abandon any right or title to the land; that the lease was executed without any consideration on his part; that no rent was ever demanded of him; and that he continued to assert his claim to the land after, as well as before, the execution of the lease. The purpose of that offer was to show that the defendant's possession was adverse, during the term mentioned in the lease. The lease, not being void because of fraud, or any other reason disclosed by the record, created the relation of landlord and tenant between the parties; and, by legal necessity, there could be no adverse possession by the defendant during the term, by the mere intention so to hold, and without the

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doing of some act which would amount to adverse possession by a tenant who had entered under a lease. The taking of the lease interrupted the running of the statute; and any subsequent adverse possession which the defendant may have held, even if it commenced immediately after the execution of the lease, could not be added to the time which had run prior to the lease; for adverse possession, in order to constitute a bar, must have been continuous during the whole statutory period. The evidence offered by the defendant was rightly excluded.

7. The plaintiff contends that the question as to the sufficiency of the evidence to justify the decision on any issue, cannot be entertained, because the statement does not purport to contain all the evidence given at the trial; and as this point is often presented, the rule will again be stated, though it has so often been repeated that it has become trite. The moving party is required to set forth so much of the evidence (and no more) as may be necessary to explain the points specified in his statement or bill of exceptions; and when such statement or bill of exceptions is settled, it will be presumed that it contains all the evidence given in the cause, which was necessary to be stated, in order to explain the points specified; and that it would not have presented a different case in respect to the specified points, had it contained, also, the omitted evidence. It is desirable that counsel shall consider this point as settled.

The other points in the case do not require any notice.

Judgment and order affirmed. Remittitur forthwith.

Mr. Chief Justice WALLACE did not express an opinion.

OCTOBER TERM. 1874.

REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
OCTOBER TERM, 1874.

[No. 4,223.]

GEORGE W. LEET v. JOHN RIDER.

QUIETING TITLE TO STREET.—One who claims title to land alleged to be a public street or highway, cannot maintain an action to quiet his title thereto against a street commissioner of a city, who claims no interest in the land.

IDEM.—Such street commissioner is the mere agent or servant of the city, and his acts done in the performance of his duty in opening streets, are the acts of the city.

APPEAL from the District Court, Sixth Judicial District, County of Sacramento.

Leet commenced this action to quiet the title to a belt of land eighty feet wide and one hundred and seventy feet long. He alleged that he was in possession of the land and owned it, and that Rider claimed it adversely to him, and threatened to enter on the same and take possession thereof, and destroy his fences, trees and shrubbery.

The land was in the city of Sacramento, and was a part of the Sutter grant. Sutter, in 1849, laid out a city, and the land in controversy was dedicated as a public street.

Argument for Respondent.

Leet had it enclosed, and had been in the adverse possession of it more than five years, when this suit was commenced. Rider claimed no interest in the land, but was Street Commissioner of the city, and as such, had informed Leet that he intended to open the street. The Court below dismissed the plaintiff's bill, and he appealed.

George Cadwalader, for the Appellant.

This was a suit to quiet title. The decision was against the appellant, because his claim to enter upon plaintiff's premises and despoil it of its improvements, was made in the capacity of Street Commissioner, and not personally.

The error of this ruling is apparent, when it is remembered that this Court, in *Head v. Fordyce*, 17 Cal. 151, decided that the Act authorizing persons in possession to sue to have their titles quieted, embraced every description of claim whereby the plaintiff might be deprived of the property or its title clouded, or its value depreciated; or whereby the plaintiff might be incommoded or damaged by the assertion of an outstanding title already held, or to grow out of the adverse pretension. The plaintiff has a right to be quieted in his title, whenever any claim is made to real estate of which he is in possession, the effect of which might be litigation or loss to him of the property.

S. Solon Hall, for the Respondent.

The land to which the plaintiff wants the title quieted is a public street. Section seven hundred and thirty-eight of the Code of Civil Procedure, under which this action is sought to be maintained, provides that "an action may be brought by any person against another who claims any estate or interest in real property adverse to him, for the purpose of determining such adverse claim." The defendant claims no estate or interest in the real property in dispute. The plaintiff obstructed the public street, and the defendant under the order of the city authorities was about to remove these obstructions. The case is, therefore, not

Argument for Respondent.

within the provisions of the law upon which the plaintiff relies.

An obstruction upon a street is a public nuisance. (Penal Code, 370; Civil Code, 3,479.) To maintain a public nuisance is a misdemeanor. (Penal Code, 372.) A public nuisance may be abated by any public body or officer authorized thereto by law. (Civil Code, 3,494.) The authorities of the city of Sacramento are authorized to prevent and remove nuisances. (City Charter, sec. 2.) Any person may abate a public nuisance which is specially injurious to him by removing, etc. (Civil Code, 3,495.) The streets of a city or town are public, free to everybody, whether residents of the city or town, or elsewhere.

Every person, therefore, has as much estate or interest in the portion of the street thus obstructed and enclosed as Rider, the defendant, has. When, therefore, the Courts have quieted the title for plaintiff as against Rider, it will, no doubt, be a great satisfaction to him and his counsel to know that among all mankind one individual, at least, is fairly got rid of.

The plaintiff relies wholly upon five years' adverse possession; if this gives no title he has none. Under the Code an obstruction on a public street is a public nuisance, and the Civil Code (sec. 3,490,) provides that "no lapse of time can legalize a public nuisance, amounting to an actual obstruction of public right." The laws of this State, before the Codes, made it a nuisance to obstruct a street. (Hittell's Digest, 1,524.) The obstruction placed upon this street was a nuisance when he put it there; when did it cease to be a nuisance? It was a crime at first; when did it cease to be one? A wrong persisted in five years ripened into a right! Lapse of time does not legalize a nuisance. (Civil Code, 3,490; *Mills v. Hall*, 9 Wend. 315; 3 Hill 621; *Digest v. Schenk*, 23 Wend. 446; *Lewis v. Stern*, 16 Ala. 214; *Kittering Academy v. Brown*, 41 Penn. st. 273.) "The title of the corporation to the soil of the streets for uses that conduce to the public enjoyment and convenience, is paramount and exclusive; and no private occupancy, for whatever time, and whether adverse or by permission, can vest a title incon-

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sistent with it." (3 Pa. Penrose and Watts, 253; *Commonwealth v. Alburger*, 1 Whart. Pa. 469—486; *Commonwealth v. McDonald*, 16 Serg. and Rawle, 390; Dillon on Corporations, Sec. 530; *Runz v. Shoneferger*, 2 Watt, 23; *Philadelphia v. Reading R. R. Co.* 58 Penn. 262; 4 Martin, La. 8; *Mayor v. Magioli*, 4 La. An. 73; *Jersey City v. Morris Canal Co.* 1 Beasley, Ch. 562.) A title to real estate acquired by adverse possession under the limitation law is a prescription regulated by statute. A prescription rests upon a presumed grant, so remote that the evidence thereof is lost. It follows that nothing can be acquired by prescription which in its nature is incapable of being granted — a grant will not be presumed of that which is not the subject of a grant.

Streets of a city cannot be granted; it is land "out of commerce," and the municipal corporation has no power of alienation; they are held in trust for public use.

The paramount authority to control and regulate public streets, and the use thereof, is in the Legislature. (Dillon on Corporations, Sec. 518; *Trenton Railroad Case*, 6 Wharton, 25.) *Nullum tempus occurrit regi* is the rule applicable to the sovereign power of a State, as has repeatedly been decided. The Code does not change this rule so far as regards encroachments upon public rights.

By the COURT:

The action cannot be maintained upon the facts appearing in the findings. Rider, the sole defendant, did not claim for himself any interest or estate in the premises described in the complaint, and, therefore, should not have been made a party defendant in an action to quiet the alleged title of the plaintiff. Rider is a mere agent or servant of the City of Sacramento; his acts done in the scope of his authority are the acts of the city, and the action cannot be maintained against him.

Judgment affirmed.

Statement of Facts.

[No. 2,996.]

**IN THE MATTER OF THE ESTATE OF JAMES HOLBERT,
DECEASED.**

ACCOUNTS OF AN EXECUTOR.—If, by the terms of a will, the executor is directed to keep invested the money belonging to the estate in first-class real estate security, and the executor loans said money upon real estate security which is not good, he cannot, in his account, charge the estate with the expenses of litigation, attorneys' fees, etc.; nor can such items be allowed to the executor in the settlement of his accounts.

IDEM.—In such case the executor, in the settlement of his accounts, is to be charged with the sum lost by the loan; but if the loan was made in good faith, he must not be charged with the stipulated rate of interest upon the sum lost, nor even with the statutory rate of interest, unless it appears that he could, with ordinary diligence, have loaned the money to others at that rate.

IDEM.—In case of such a loan, the advice of his attorney cannot shield the executor from responsibility, if the money was loaned on land already encumbered, and no examination was made of the records, and no abstract was furnished to the attorney upon which his opinion could be had.

APPEAL from the Probate Court, County of San Joaquin.

Frank Rock was the executor of the will of James Holbert, deceased. By the will, the executor was directed to keep invested the money of the personal estate upon first class real estate security for the same. L. T. Carr was retained by the executor as his attorney in the administration of the estate. He was also the attorney for Dexter A. Davis, A. Henderson, and James McNaughton, to procure for them severally, the right to preëempt three quarter sections of public land, in Stanislaus County. After the preëmptioners had obtained authority from the land department to prove up their respective preëmption claims, and, on the 10th day of August, 1871, the preëmptioners went to the Stockton land office, in San Joaquin County, to make proof and payment to the Receiver. At that time the executor had deposited in the San Joaquin Valley Bank at Stockton, one thousand two hundred dollars, the funds of the estate, which sum he had instructed his attorney to loan in accordance with the directions of the will. The

Statement of Facts.

attorney loaned said sum to the preëmptioners, and took their note, payable to the executor, one year after date, with interest at one and a half per cent. per month, and, to secure the note, the preëmptioners executed and delivered to the attorney, for the executor, a mortgage on the land. No examination was made of the records of Stanislaus County. At the time the mortgage was given there was a mortgage on the land made by said Davis, McNaughton, and Henderson, to one Ward, to secure the payment of a note for two thousand dollars, given by the mortgagors to Ward, in payment of Ward's possessory interest in the land. Ward commenced an action to foreclose his mortgage, and made the executor a party defendant. The executor was advised by his attorney to defend the action, as, in his opinion, the mortgage to Ward was invalid. Ward obtained a decree foreclosing his mortgage, and directing a sale of the premises, and the application of the first proceeds to pay his debt, the costs, and expenses of sale. The next proceeds were to be applied on the debt to the executor. He realized from the sale the sum of four hundred and sixty-eight dollars. On the 6th of January, 1873, the executor filed his annual account. In this account he charged the estate with the following items:

Expenses to Modesto, which was the county seat of Stanislaus County, in attending to the case of <i>Ward v. Rock et al.</i>	\$ 12 50
Expenses of L. T. Carr to Modesto and Sacramento	30 00
Attorneys' fees paid Terry and Carr, in case of <i>Ward v. Rock et al.</i>	300 00
He also credited himself with the balance due on the judgment against Davis, McNaughton, and Henderson, to wit.....	1,092 00

The heirs objected to the allowance of the above items in the account. The Probate Court disallowed the three hundred dollars paid to the attorneys, and the item of one thousand and ninety-two dollars, the balance due on the judgment. This last item was made up of the principal

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sum, and interest at one and a half per cent. per month, less the four hundred and sixty-eight dollars. The other items were allowed. The executor appealed from the order.

The other facts are stated in the opinion.

L. T. Carr and J. H. Budd, for the Appellant.

The loss to the estate, if any, from the loan made by the executor through his attorney to Davis, McNaughton and Henderson, was without any fault on the part of the executor, and he should not suffer the loss, if any. (Probate Act, sec. 217; *Thompson v. Brown*, 4 Johns. 629; 8 Barb. 148; *Rayner v. Pearsall et al.* 3 Johns. 578.)

An executor honestly acting on professional advice will not be charged with loss resulting from his so acting. (*Vez v. Emory*, 5 Vesey, 144; *Thompson v. Brown*, 4 Johns. 629.)

The employment of attorneys by the executor in the suit of *Ward v. Rock* and others was necessary, and the executor should have been allowed his necessary expenses for the services of his attorneys in that suit. (Probate Act, sec. 219.)

By the Court, WALLACE, C. J.:

1. The loan made by Rock, the executor, through his attorney, to Davis and others, was not made "upon first-class real estate security," as directed by the will. The sum loaned was one thousand two hundred dollars, and the real estate upon which it was loaned, worth no more than two thousand two hundred dollars, was already under mortgage to one Ward for two thousand dollars.

2. The advice of his attorney cannot shield the executor for his responsibility, otherwise clear, on account of this unauthorized loan. The loan was made in the county of San Joaquin, while the mortgaged premises were situated in the neighboring county of Stanislaus. No examination of the records in the latter county was made for the pur-

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pose of ascertaining whether or not the title was already encumbered; no abstract was furnished the attorney; there was therefore nothing — no fact submitted to him — upon which his opinion could be had, and the advice of the attorney given under such circumstances, was not the “professional advice” under which the executor can protect himself from liability for loss incurred.

3. The loan having been originally one not authorized by the will, the expenses of litigation, attorney’s fees, etc., incurred by the executor in the foreclosure suit subsequently instituted by Ward, cannot be charged against the estate, nor allowed to the executor in the settlement of his accounts.

4. The loan made under the circumstances appearing, while certainly far from prudent in a business point of view, was nevertheless made by the executor in “good faith,” as affirmatively appears by the bill of exceptions settled below; and, as observed by Chancellor KENT, it is the habit of the Court to treat with great tenderness trustees acting in good faith. (4 Johns. Ch. R. 627.) The sum loaned was one thousand two hundred dollars; the rate of interest stipulated to be paid by the borrowers was one and one half per cent. per month. The sum collected upon the loan by the executor was only four hundred and sixty-eight dollars. Of course the executor, upon settlement of his accounts, is not to be charged with interest at the rate stipulated to be paid by the borrowers. If such a rule could ever be properly applied, it could only be done in a case where *mala fides* was established, and here, as we have seen, there was none. Nor do we think that, under the circumstances, the executor should be charged with interest, even at the statutory rate. It does not appear by the record that he could, in the exercise of reasonable diligence, have loaned it to others at that rate, or at any rate of interest whatever, during the time it has remained in the hands of the borrowers. The basis of accountability under such circumstances, is the same as though it had been kept on hand by him for the purpose of making a loan, but without the opportunity of doing so, in which case he would not

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have been chargeable with interest. The executor should, therefore, have been held liable only for the sum of seven hundred and thirty-two dollars, which is the balance of the loan remaining uncollected after applying the four hundred and sixty-eight dollars actually received by the executor. If, however, any sum exceeding the sum of seven hundred and thirty two dollars and the actual expenses of the executor, incurred by him in connection with the loan should be hereafter collected by the executor upon the loan made to Davis, the excess is, of course, to be placed to the credit of the estate, and will constitute a new subject of account by the executor.

The order is reversed and the cause remanded, with directions to settle the account upon the basis indicated in this opinion.

Mr. Justice RHODES did not express an opinion.

[No. 4,084.]

THE PEOPLE v. JOHN HANCOCK AND JOHN C. HAYS AND THE MUSCUIPIABLE RANCHO.

VOID ASSESSMENT FOR TAXES.—When the assessor assesses an entire tract of land to a person, and the person assessed had previously sold a part of the same by metes and bounds, and the assessment contains nothing to show what valuation the assessor placed on the part not sold, the assessment is fraudulent and void, and the tax cannot be collected.

APPEAL from the District Court, Eighteenth Judicial District, San Bernardino County.

Action to recover a tax levied on an assessment of the Muscupiable Rancho, in San Bernardino County. The rancho contained twenty-four thousand six hundred and fifty-six acres, and the entire ranch, as a whole, was assessed at twenty-four thousand six hundred and fifty-six dollars. Two years before the assessment, the defendants, Hancock and Hays, had sold to A. J. Pope seven thousand four hundred and seventy-nine acres of the rancho by

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metes and bounds, leaving the defendants only seventeen thousand one hundred and seventy-seven acres. The answer alleged a fraudulent assessment. There was no evidence to show the value placed by the Assessor, on the seven thousand four hundred and seventy-nine acres sold. The Court below rendered judgment for the defendants, and the people appealed.

John L. Love, Attorney-General, for the Appellant.

C. G. W. French and *Henry Hancock*, in *pro. per.*, for the Respondents.

By the Court, **McKINSTRY, J.:**

The defendants answered and proved that a tract of land containing nearly one third of the larger tract described in the assessment had been by them sold and conveyed by deed, duly recorded, two years before the assessment was made. The Court below found that the assessment contained no *data* from which could be estimated what sum should be paid by the defendants, and properly gave judgment for the defendants.

Judgment affirmed.

Neither Mr. Justice **CROCKETT** nor Mr. Justice **RHODES** expressed an opinion.

[No. 3,988.]

LUCY J. FULLER v. FRANCES BAKER.

MOTION TO VACATE SATISFACTION OF JUDGMENT.—When the attorney for a party enters satisfaction of a judgment recovered by his client for a sum less than the amount of the judgment, and the client moves to have the satisfaction vacated, and for an execution to issue, and the testimony is conflicting as to whether the attorney had authority from his client to enter such satisfaction, and the Court below denies the motion, the Supreme Court will not disturb the decision of the Court below.

SATISFACTION OF JUDGMENT BY AN ATTORNEY.—The question not decided whether an attorney at law, as such, has power, without receiving au-

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thority from his client, to enter satisfaction of a judgment recovered by such client upon the payment of a less sum than the amount of the judgment.

APPEAL from the District Court, Seventeenth Judicial District, County of Los Angeles.

The judgment was recovered by Mrs. Fuller on the 6th day of March, 1873. On the 24th day of March following, satisfaction of the judgment was entered in open Court, in the following words, as entered on the minutes:

“*Lucy J. Fuller v. Frances Baker.*— Now comes F. Stanford, Esq., of attorneys for plaintiff, in open Court, and states that, regarding the solvency of defendant as doubtful, and believing it questionable whether or not the judgment in this case could be collected of the defendant Baker, or whether or not said judgment, as it now stands, would be affirmed on appeal; and believing it to be to the best interests of his client, the plaintiff in this case, he, as her attorney, has accepted two hundred dollars in United States gold coin, in full satisfaction of said judgment, of which he retains one hundred dollars as attorney’s fee, as attorney of plaintiff, allowed him by said judgment, and he now pays into Court the remaining one hundred dollars to apply on the costs of plaintiff in this case.”

The other facts are stated in the opinion.

McConnell & King, for the Appellant, argued that the attorney had no power to compromise the judgment of his client by receiving a less sum than was due, and cited, Code of Civil Procedure (title 8, ch. 1, Art. 282, 283); *Cumber v. Wane*, 1 Strange, R. 426; 1 Smith’s Leading Cases, 6th Am. Ed., p. 549 and *Diland v. Hiatt*, 27 Cal. 611.

A. Brunson, for the Respondent.

By the Court, CROCKETT, J.:

The plaintiff recovered a judgment for two dollars against the defendant, in an action for slander; and her

Statement of Facts.

been paid. The trial was before a jury. The plaintiff offered in evidence the following contract:

Broker's Contract.

" Amount	\$4,500
" Deposit	900
<hr/>	
" Balance	\$3,600

" SAN FRANCISCO, October 26, 1871.

" I have this day sold to F. A. Hassey one hundred and fifty shares Eureka Consolidated Mining Company's Stock, for the sum of forty-five hundred dollars, payable in United States gold coin, and deliverable at the buyer's option within thirty days from date hereof. For the due fulfillment of this contract I have received on account, as part payment, the sum of nine hundred dollars (\$900), the receipt of which is hereby acknowledged, and upon further payment of the balance due I agree to transfer to F. A. Hassey, or to his order, the above-mentioned stock in accordance with the terms of this contract.

" N. B. All unmentioned points in this contract subject to the rules of the San Francisco Stock and Exchange Board.

" (Signed.) J. C. WINANS. [SEAL.]"

He then proved that both parties were members of the Board of Brokers, in San Francisco, and that the sale was made in the Board. The plaintiff's counsel then offered to prove by him the custom of brokers with regard to making and delivering such contracts, for the purpose of explaining how the contract came to be delivered without the payment of the nine hundred dollars. The defendant objected as irrelevant, but the Court overruled the objection. The plaintiff then testified that the custom, after such a sale, was to make a contract and duplicate, describing the transaction; the seller then to sign one, and the buyer the other, and the contracts and stock were then placed in the bank, and the bank then wrote on the back of the buyer's contract a certificate, stating the number of shares of stock that

Opinion of the Court — NILES, J.

were deposited, and delivered it to him. That upon such delivery the nine hundred dollars should have been collected, but it was not done. The defendant also objected to any evidence contradicting the acknowledgment of a receipt of the money contained in the contract, but the Court overruled the objection. The jury returned a verdict for the plaintiff, but did not specify in what kind of money it should be paid. The Court rendered judgment for the plaintiff in gold coin. The defendant appealed.

G. F. & W. H. Sharp, for the Appellant.

J. W. Winans, for the Respondent.

By the Court, NILES, J.:

1. The receipt written in the contract was only *prima facie* evidence of the payment of the money. It was competent for the plaintiff to prove the habitual course of dealing among members of the Board of Brokers in transactions like the one in question, as tending in some degree to account for the delivery of the contract to the defendant, although the first payment had not been actually made.

2. It was alleged in the complaint, and admitted by the answer, that the contract called for payment in gold coin, and judgment was properly so rendered. It is not required that the verdict in such case should specify the kind of currency or money to be recovered.

3. Several exceptions were taken to the admission of evidence, which cannot be considered here, as no specific ground of objection was stated at the trial.

We see no substantial error in any ruling of the Court. Judgment and order affirmed.

Neither Mr. Justice CROCKETT nor Mr. Justice RHODES expressed an opinion.

Opinion of the Court — McKinstry, J.

[No. 8,981.]

MATTHEW KELLER v. FRANCISCO RUIZ DE
OCANA.

COMPLAINT IN EJECTMENT.—In a complaint to recover possession of land, it is sufficient to aver that the plaintiff owns the same, and that the defendant is in possession adversely to the plaintiff, and withholds the same.

APPEAL from the District Court, Seventeenth Judicial District, County of Los Angeles.

Ejectment to recover possession of a part of lot number eleven, block number thirty-three, in Los Angeles. The complaint averred that "the plaintiff is the owner in fee simple of all that lot situated in the county and city of Los Angeles; * * * that the defendant is in possession of said lot without license from the plaintiff, and adversely to him, and that he withholds the same from the plaintiff, to plaintiff's damage five hundred dollars." Then followed the usual prayer for judgment.

The defendant demurred, and the Court sustained the demurrer, because "the complaint does not allege present right of possession." The plaintiff declining to amend, judgment by default was rendered against him. The plaintiff appealed.

Glassell, Chapman & Smith, for the Appellant.

Stanford & Ramirez, for the Respondent.

By the Court, MCKINSTRY, J.:

The demurrer to the complaint should have been overruled. (*Payne v. Treadwell*, 16 Cal. 242.)

Judgment and order reversed, and cause remanded.

Mr. Justice RHODES did not express an opinion.

Statement of Facts.

[No. 4,253.]

PIO PICO v. A. CUYAS.

LAW OF A CASE.—When the Supreme Court has settled the law of a case, the Court below has no right to assume that the law is otherwise than as settled because of statements in affidavits filed in the Court below, that the party in whose favor the law was settled, claims that it is otherwise. .

UNLAWFUL DETAINER.—A party cannot recover possession of premises under the Act allowing an action of unlawful detainer to be brought against a tenant holding over or failing to pay rent, unless the relation of landlord and tenant exists by convention.

PARTNER CANNOT MAINTAIN UNLAWFUL DETAINER AGAINST COPARTNER.—If the owner of a hotel leases the same, and then enters into such a partnership with the lessee, as to destroy the lease, he cannot afterwards maintain an action of unlawful detainer against his partner and former tenant.

REVERSAL OF JUDGMENT IN UNLAWFUL DETAINER.—If judgment passes against the defendant in unlawful detainer, and the plaintiff is placed in possession of the premises, and the defendant appeals, and the judgment is reversed, the defendant is entitled to be restored to the possession, even if the plaintiff has rented the premises to a tenant.

APPEAL from the County Court, County of Los Angeles.

This is the second appeal in the above cause. The first is reported in 47 Cal. 180, where the facts are stated. Upon the reversal of the judgment, and the granting of a new trial as stated in the opinion in 47 Cal.; and when the remittitur had been filed with the Clerk of the Court below, the defendant moved to be restored to the possession of the hotel. He had, when the judgment in favor of Pico was rendered, been turned out of possession under a writ of restitution, and Pico had rented the hotel to one Knowlton, who took the lease with knowledge of the pendency of the action, and of the appeal.

On the hearing of the defendant's motion to be restored to the possession, the plaintiff, Pico, filed an affidavit of Charles Knowlton, stating that he had, on the 24th of March, 1873, leased the hotel and furniture from Pico, for the term of two years, upon the payment of a monthly rent of seven hundred and fifty dollars. The affidavit then proceeded thus:

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“For further answer, he avers it is true he had ‘knowledge of the suit adjudicated in the County Court, and of its pendency on appeal in the Supreme Court,’ but avers that he had knowledge at the same time that said Cuyas had disavowed any right to the possession in his own right, and only claimed to have previously had some right to such possession as the member of a partnership which had long before that time been dissolved. As respects the decision of the Supreme Court, respondent avers that the same was not rendered until long after the execution of his said lease and his entry thereunder upon said premises, and that, therefore, he could not have had any knowledge of the same prior to his said entry.

“Further answering, respondent avers that he has been informed and verily believes that said Cuyas has no right, interest or estate whatever in said Pico House or in said furniture, or in any part of either, and no right in the possession of the same; that said Pico did, long prior to the execution of respondent’s lease, make what purported to be a lease of the said house alone to the said Cuyas; that said so-called lease never, in point of fact, went into operation or vested in said Cuyas, any right whatever to the possession of said house; that said Cuyas never entered into possession of said house under said so-called lease or paid any rent in accordance with its terms, but that the only entry thereon ever made, and the only possession ever had by him of said house was rendered in pursuance of an alleged partnership in the business of hotel keeping entered into by said Cuyas and said Pico.

“That said so-called lease was, as claimed and asserted by said Cuyas, wholly suspended and set aside by the terms of said alleged partnership, and the effect thereof as a lease destroyed; that said Cuyas, at divers times and upon divers occasions, and especially upon the trial in the County Court of the cause of *Pico v. Cuyas*, referred to in the affidavit of said Cuyas, stated upon oath that the said so-called lease to him had been merged and superseded by the said partnership, and the said Cuyas upon that and other occasions further stated that he had no in-

Argument for Respondents.

terest whatever in said furniture, but that the same was wholly owned by the said Pico; that before accepting the lease aforesaid, respondent had full notice of the foregoing and other statements and declarations of said Cuyas; and further, that if any partnership had ever in fact existed between said Pico and Cuyas, the same had been long before that time wholly dissolved; that respondent, relying on the statement and representations of said Cuyas respecting the said so-called lease, and knowing that said partnership, if it had ever existed, had been dissolved, was induced thereby to take the lease aforesaid from said Pico."

The Court below denied the defendant's motion to be restored to the possession, and he appealed from the order.

Howard and Ganahl, for the Appellant.

That a plaintiff must restore to his opponent any advantage he obtained through his judgment upon its reversal, is a very ancient doctrine. (*Jones v. Harker*, 5 Mass. 264; *Cummings v. Noyes*, 10 Mass. 433; *Jackson v. Cadwell*, 1 Cowen, 644; *Bank of United States v. Bank of Washington*, 6 Peters, 8.)

The Supreme Court of California have indorsed the position in *Reynolds v. Harris*, 14 Cal. 667. They have sustained *Reynolds v. Harris* in *Polack v. Shafer*, (46 Cal. 270.)

Glassell, Chapman & Smith, for the Respondents.

Knowlton had a right to infer, and did in fact infer, from the oft repeated avowals of Cuyas, that he was in possession as Pico's partner, and in that character only.

If he is to be restored, then, to what he hath actually lost, he is to be restored as the partner of Pico. But Pico has sold out, and he had a right as partner to sell, and such sale, *ipso facto*, worked a dissolution. Knowlton then became by his purchase of the term, a tenant in common with Cuyas, according to Cuyas' own showing, so that it is clearly impossible to remit him back to his status before the judgment.

Opinion of Rhodes, J. and Crockett, J., dissenting.

By the COURT:

In *Pico v. Cuyas* (47 Cal. 175), this Court said: "We do not think that the effect of the contract proven was to change or modify the terms of the lease, or to work a surrender of it. The two contracts are entirely separate and distinct." This was adopted as the law of the present case. (*Pico v. Cuyas*, 47 Cal. 180.) The Court below, therefore, was not authorized to assume that the law was otherwise, because of a statement in an affidavit that the defendant claimed that "the so-called lease was wholly suspended and set aside by the alleged contract of copartnership." But if it could be assumed that such was the legal effect of the agreement of copartnership, the plaintiff could never recover the possession in the present form of action, because the relation of landlord and tenant did not exist by convention.

The existence of the partnership and the non-existence of the lease when the action for unlawful detainer was brought, would always constitute a defense to that action. The dissolution of the partnership would not aid the plaintiff to a recovery in the County Court. When that Court determined, on motion, that the plaintiff had a right to the possession, without reference to his asserted right under the lease, it, in effect, tried a supposed action of ejectment (in which no pleadings had been filed, and no jury was impaneled) upon *ex parte* affidavits.

Order reversed and cause remanded, with directions to the Court below to sustain the motion of Cuyas. Remittitur forthwith.

RHODES, J., and CROCKETT, J., dissenting in part:

After the plaintiff had obtained judgment in the County Court, a writ was issued, and under it he was put in possession of the premises. The judgment of the County Court having been reversed, and the cause remanded, the defendant moved the County Court that he be restored to the possession of the premises, and this motion was denied. From this order the appeal is taken.

Opinion of the Court — Crockett, J.

This order is not an appealable order. It is not expressly enumerated as such in the Code, and it is not a "special order made after final judgment," for there was no final judgment when the order was made. The order may be reviewed on an appeal from the judgment.

If the order was properly before us for review, we think, the opinion of the majority of the Court establishes that the plaintiff was entitled to be restored to the possession.

[No. 2,949.]

IN THE MATTER OF THE ESTATE OF MARGARETHA
PFUELB.

CONSTRUCTION OF A WILL.—A will, made before the present Codes took effect, is to be construed under the statutes in force at the time it was made.

CONSTRUCTION OF A WILL.—The word "relation," in the statute, providing that a devise to a relation shall not lapse by the death of the devisee during the lifetime of the testator, if the devisee leaves lineal descendants, includes only relations by blood, and not by affinity.

APPEAL from the Probate Court, City and County of San Francisco.

The Court below denied the application for a distribution of the four thousand dollars to the daughter of the deceased step-son, and she appealed.

The other facts are stated in the opinion.

Gray & Haven, for the Appellant.

George & Loughborough, for the Respondent.

By the Court, CROCKETT, J.:

In the year 1869 the testatrix made and published her last will and testament, by which she bequeathed to a son of her deceased husband, by a former wife, the sum of four thousand dollars. The step-son died in May, 1872, leaving

Opinion of the Court — Crockett, J.

a surviving daughter, and the testatrix died in the September following. Her will has been duly probated; and the daughter of the step-son applies for distribution of the four thousand dollars, claiming that the legacy to her father did not lapse, but survives to her under our statute of wills.

The testatrix having died before the present Codes took effect, the will is to be construed under the statutes then in force; section twenty of which is as follows: "When any estate shall be devised to any child or other relation of the testator, and the devisee shall die before the testator, leaving lineal descendants, such descendants shall take the estate so given by the will, in the same manner as the devisee would have done if he would have survived the testator." (Statutes 1850, p. 179.) The question for determination is, whether the step-son was a "relation" of the testatrix in the sense of this section.

It will be observed that the provision of the statute is confined to a devise to "any child or other relation of the testator." Does the term "relation," as here used, include relations by affinity as well as by blood? In its widest popular sense, it might possibly include both; but Courts have been frequently called upon to construe it in the interpretation of wills, and it has been uniformly held to include, in its legal sense, only relations by consanguinity. (2 Kent's Com. 537, note; 2 Jarman on Wills, 45; 2 Redfield on Wills, 425; *Storer v. Whitney*, 1 Penn. St. R. 506.)

In *Esty v. Clarke*, (101 Mass. 36,) the Court was called upon to construe a statute strictly analogous to ours; and it was there held that the wife is not a relation of the husband within the meaning of the statute, and that her son by a former marriage, will not, by virtue of the statute, take a bequest to her by her husband. It is unnecessary for us to go so far in this case; but if the son by a former marriage of a deceased husband of the testatrix, is a "relation" within the sense of the statute, then a cousin in the third or fourth, or any remote degree of the husband, would come within the same category. In providing that a devise to a "relation" of the testator should not lapse by the death of the devisee during the lifetime of the testator, if

Statement of Facts.

the devisee left lineal descendants, it was not intended to include persons in no wise related to the testator, except through affinity.

Order affirmed. Remittitur forthwith.

Mr. Justice RHODES did not express an opinion.

[No. 4,184.]

FRANCAIS BREON v. JACOB STRELITZ.

SALE OF MORTGAGED PROPERTY.—If a mortgage is recorded, its lien is not affected by sales of the mortgaged property made by the mortgagor pending proceedings to foreclose it.

ENJOINING SALE OF MORTGAGED PROPERTY.—An injunction should not be granted to restrain the mortgagor from selling the mortgaged property pending proceedings to foreclose a mortgage.

APPEAL from the District Court, Seventeenth Judicial District, County of Los Angeles.

The plaintiff, on the 29th of March, 1873, loaned the defendant fifteen hundred dollars, for the term of five years, and the defendant executed his promissory note therefor, and to secure the note gave the plaintiff a mortgage on lots, 1, 2, 3 and 4 of block B., in the city of Los Angeles. The defendant covenanted in the mortgage that he would, within six months, expend the sum of fifteen hundred dollars in erecting permanent and valuable improvements on the mortgaged property, including at least one substantial dwelling-house. The plaintiff, on the 5th of January, 1874, filed a bill to foreclose the mortgage, in which he alleged that the mortgaged property was not worth more than four or five hundred dollars, and that he would not have made the loan but for the covenant contained in the mortgage, and that the defendant in order to obtain the loan, fraudulently represented that he would make the improvements mentioned in the covenant, and that the defendant had not made the improvements; that he owned some lots in Los Angeles, beside those mortgaged, and was threatening to

Statement of Facts.

sell all his lots, including those mortgaged, in order to defraud the plaintiff out of his debt. That the defendant was insolvent, and the plaintiff would lose his debt if the defendant sold his property. There was a prayer for a preliminary injunction restraining the defendant from selling any of his lots in Los Angeles. The Court granted the preliminary injunction as to the lots mortgaged. The defendant appealed from the order granting the injunction.

Stanford & Ramirez, for the Appellant.

V. E. Howard & Sons, for the Respondent.

By the COURT:

The mortgage was duly recorded, and its lien would not be at all interfered with by sales of the mortgaged premises, made by the mortgagor pending the proceedings to foreclose it; nor would the plaintiff be embarrassed in its foreclosure, if a proper *lis pendens* were filed. Under such circumstances the order of injunction, while it might embarrass the defendant, could be of no conceivable benefit to the plaintiff.

Order reversed. Remittitur forthwith.

[No. 4,281.]

MACY v. DAVILA.

MOTION FOR NEW TRIAL.—When the notice of a motion for a new trial was served in 1872, the proceedings upon the motion must be determined by the Practice Act then in force, and not by the Code of Civil Procedure.

MOTION TO DISMISS MOTION FOR A NEW TRIAL.—If the Court below does not decide a motion to dismiss a motion for a new trial, the appellate Court cannot consider the question.

IDEM.—If no appeal is taken from an order refusing to dismiss a motion for a new trial, the appellate Court cannot review the order.

IDEM.—If the record on appeal does not contain any facts in support of a motion to dismiss a motion for a new trial, the appellate Court will not disturb an order denying the motion.

Opinion of the Court — Wallace, C. J.

ORDER GRANTING NEW TRIAL.—If the trial Court grants a new trial on the ground that the evidence is insufficient to support the decision, and the evidence is substantially conflicting, the appellate Court will not disturb the order granting a new trial, even if the order is made by a judge who did not hear the evidence at the trial.

APPEAL from the District Court, Seventeenth Judicial District, County of Los Angeles.

The cause was tried by the Court. The final judgment was rendered September 2, 1872, by R. M. Widney, then Judge of the Seventeenth Judicial District. The notice of intention to move for a new trial was served and filed September 5, 1872. The motion to dismiss the motion for a new trial was made February 3, 1874. The new trial was granted by Judge Sepulveda, who was the successor in office of Judge Widney, on the 28th of February, 1874. The defendants appealed from the order granting a new trial.

The other facts are stated in the opinion.

Stanford & Ramirez, for the Appellants.

Glassell, Chapman & Smiths, for the Respondent.

By the Court, WALLACE, C. J.:

1. The action is ejectment, and was tried in 1872, and the appeal is taken from an order entered February 28, 1874, granting the plaintiff a new trial. The notice of intention to move for a new trial having been served upon the attorneys of the defendants in 1872, the proceedings upon the motion are to be determined by the Practice Act then in force, and not by the Code of Civil Procedure. (*Kelly v. Larkin*, 47 Cal. 58.)

2. On the 3d of February, 1874, and before the decision of the pending motion for a new trial, the defendants moved the Court below to dismiss it for want of diligence in its prosecution; because the motion had already been determined; because no notice of the time when the motion for a new trial would be presented had been served upon the

Opinion of the Court — Wallace, C. J.

defendants, and because the motion itself had become “barred by the Statute of Limitations.” Much of the argument filed here by the attorneys for the defendants, is directed to this motion, made by them in the Court below to dismiss the motion — for a new trial; but, for several reasons, we cannot consider the question sought to be made here in this respect. The motion to dismiss was not determined by the Court below. No order disposing of that motion is found in the record. No appeal is taken from such an order. But if such an order had been entered below, and an appeal had been taken therefrom, no facts are shown or attempted to be shown in the record which would support the motion to dismiss, and, therefore, even if it is to be considered as having been virtually denied by the subsequent order granting the plaintiff a new trial, it must have been taken to have been correctly denied.

3. The statement upon motion for a new trial contained many specifications of alleged errors, both of fact and of law. It specified several particulars, in which the evidence was claimed to be insufficient to support the decision upon the issues of fact made under the pleadings at the trial, and upon which issues of fact the evidence appears to have been substantially conflicting. We have constantly held that in such cases we would not disturb an order disposing of a motion for a new trial; and the circumstance that the decision upon the motion was made by a Judge of the Court below, who did not hear the evidence at the trial, makes no difference in the application of the rule. (*Altschul v. Doyle*, ante p. 535.)

Order affirmed.

Mr. Justice RHODES did not express an opinion.

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ACKNOWLEDGMENT OF DEED.

See DEEDS, 6.

ADMINISTRATOR.

See NEW TRIAL, 2; TRUSTS, 1; PROBATE COURT; ESTATES OF DECEASED PERSONS.

AGENCY.

1. **PRINCIPAL AND AGENT.**—The relations between an attorney in fact, who undertakes to care for and protect the land of his principal, and negotiate sales of the same, and the principal, are of a fiduciary nature, and the agent must not put himself, during his agency, in a position which is adverse to that of the principal. *Rubidoe v. Parks*, 215.
2. **IDEM.**—Agents, from the nature of their employment, are subject to the rule which governs the relation of trustee and *cestui que trust*, and an act of the agent with respect to the subject-matter of the agency, injurious to the principal, may be avoided by the principal, as between themselves. *Id.*
3. **DEALINGS BETWEEN PRINCIPAL AND AGENT.**—The agent and principal are not absolutely prohibited from dealing with each other in respect to the subject-matter of the agency or trust; but, in all their dealings with each other, the utmost good faith is required, and the burden of proof is on the agent to show affirmatively that he acted in good faith, fairly and honestly. *Id.*

AMENDMENTS.

1. **AMENDMENT TO COMPLAINT.**—If an attorney enters an appearance in a case for a person who is not named in the complaint as a party defendant, after the defendant named in the complaint has answered, and by stipulation, the answer on file is considered as the answer of the party for whom the attorney thus appears, the complaint should be amended by inserting the name of such party; and if not amended before an appeal is taken, the Supreme Court will direct the Court below to allow the amendment, even if it affirms the judgment. *Baldwin v. Bornheimer*, 438.

See PLEADINGS, 2.

APPEAL.

1. NOTICE OF APPEAL.—A notice of appeal given before July 1, 1874, was required to be filed on the same day it was served. *Dusen v. Stewart*, 567.
2. *IDEM.*—The question whether the amendment to section nine hundred and forty of the Code of Civil Procedure, which went into effect July 1, 1874, changed the rule in this respect, not decided. *Id.*
3. DISMISSAL OF AN APPEAL.—If an appeal is ineffectual from failure to file and serve the notice on the same day, a motion to dismiss the same will be denied. *Id.*

See PARTIES TO ACTIONS, 1; PRACTICE, 2, 3.

APPEARANCE.

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ASSESSMENT.

COMPLAINT FOR STREET ASSESSMENT.—The complaint, in an action to enforce a lien for a street assessment in San Francisco, must aver that the defendants are the owners of, or have some interest in the land sought to be charged with the alleged lien. *San Francisco v. Doe*, 560.

ASSIGNEE.

See BANKRUPTCY, 2, 3, 4, 5.

ATTORNEY IN FACT.

1. POWER OF ATTORNEY.—A power authorizing the attorney in fact to sell all the real estate of the principal, lying in the City and County of San Francisco, is good, without a particular description of the property owned by the principal. *Roper v. McFadden*, 346.
2. *IDEM.*—The fact that a power of attorney is not acknowledged or recorded, does not affect its validity. *Id.*

See AGENCY, 1.

ATTORNEY AND CLIENT.

See CONTRACTS, 1, 2; EQUITY, 1, 2, 13, 14; NEW TRIAL, 3.

ATTORNEY AT LAW.

1. ATTORNEY AT LAW.—If a person has been admitted to practice as an attorney at law in another State, and has been accustomed to practice here and been recognized by the Courts and bar here as a member of the bar, he is, *de facto*, an officer of the Court in this State, and the validity of his acts as an attorney cannot collaterally be called in question. *Garrison v. McGowan*, 592.
2. *IDEM.*—The entry of the appearance of a defendant by such attorney is of the same effect as though the attorney had been admitted to practice in the Courts of this State. *Id.*

3. **ENTERING APPEARANCE BY ATTORNEY AT LAW.**—If an attorney at law, who has no authority to do so, enter the appearance of a defendant in an action without the service of process, and the fact of the want of authority is made to appear, the entry of the appearance is void. *Id.*
4. **RELIEF AGAINST JUDGMENT RENDERED ON APPEARANCE BY AN ATTORNEY.**—The presumption is that the attorney who enters the appearance of a defendant, without service of process, was authorized to do so, and one who seeks relief in equity from a judgment rendered against him, on an appearance entered by an attorney, must make out a clear case of want of authority in the attorney, and must show clear merits, and take prompt action. *Id.*
5. **PRESUMPTION THAT ATTORNEY WAS EMPLOYED TO ENTER AN APPEARANCE.**—If an agent of an absent defendant has been in the habit of employing an attorney at law for the absent defendant, and has paid him for services out of the funds of such defendant, and such defendant was in the habit of leaving the conduct of his suits with such agent, the presumption is that an appearance entered by such attorney for said defendant was by authority. *Id.*

See JUDGMENT, 4.

BAIL.

See CRIMINAL LAW, 1.

BANKRUPTCY.

1. **COMPLAINT BY ASSIGNEE IN BANKRUPTCY.**—In proceedings in bankruptcy, the legal title to the property of the bankrupt vests in the assignee, and in an action brought by the assignee to recover the assets of the bankrupt, it is not necessary to aver in the complaint, the bankruptcy of the bankrupt, nor the appointment of the plaintiff as assignee; but it is sufficient to allege that the plaintiff owns the property. The facts by which the assignee acquired the property are not ultimate, but probative facts. *Dabmann v. White*, 439.
2. **ACTION BY ASSIGNEE IN BANKRUPTCY.**—In an action by an assignee in bankruptcy to recover the assets of the bankrupt, the plaintiff may prove the bankruptcy, and his appointment as assignee, under a general allegation in the complaint, that he owns the goods. *Id.*
3. **SUIT BY ASSIGNEE IN BANKRUPTCY AGAINST A STRANGER.**—Although an assignee in bankruptcy holds the legal title to the property of the bankrupt when recovered, in trust for the purposes specified in the statute, still, as between him and a stranger, he holds the title, and may assert it in the same form of action as though he owned the fee. *Id.*
4. **PROOF IN ACTION BY ASSIGNEE IN BANKRUPTCY.**—In an action by the assignee in bankruptcy against a stranger to recover the assets of the bankrupt, it is not necessary for the plaintiff to prove his appointment as assignee, nor all the steps taken in the proceedings in bankruptcy, but after proof of the adjudication in bankruptcy, a copy of the assignment is evidence of the assignee's title. *Id.*
5. **ASSIGNEE IN BANKRUPTCY CAN SUE IN STATE COURT.**—An assignee in

bankruptcy can maintain an action in a State Court to recover personal property disposed of by the bankrupt in fraud of the bankrupt law, or damages therefor. *Id.*

BILL OF EXCEPTIONS.

1. **EVIDENCE IN BILL OF EXCEPTIONS OR STATEMENT.**—When a statement or bill of exceptions is settled, it will be presumed that it contains all the evidence given in the cause which was necessary in order to explain the points specified, and that it would not have presented a different case in respect to the specified points, had it contained also the omitted evidence. *Abbey Homestead Association v. Willard*, 614.

BILLS OF EXCHANGE.

1. **ALTERATION IN A DRAFT.**—If a person who has no authority to do so, and who is not the agent for the payee for that purpose, writes across the face of a draft, payable generally in money, the words "payable in United States gold coin," it is not such an alteration of the draft as vitiates it. *Langenberger v. Kroeger*, 147.
2. **DRAFT PAYABLE IN CURRENCY.**—A draft which does not specify the particular kind of money in which it is payable may be paid in legal tender notes. *Id.*
3. **EVIDENCE OF KIND OF MONEY DRAFT IS PAYABLE IN.**—If a draft does not specify the kind of money in which it is payable, evidence cannot be introduced that it was understood and agreed that it should be paid in either gold or silver, nor can a mercantile usage make it payable in gold or silver. *Id.*
4. **DEMAND OF PAYMENT OF DRAFT.**—If a draft does not specify the kind of money in which it is made payable, a demand of payment in gold coin, whether by a notary or the holder, is not sufficient to charge the drawer. *Id.*
5. **IDEM.**—In the absence of evidence to the contrary, the presumption is that a notary demands payment of a draft in the currency in which it appears on its face to be made payable. *Id.*
6. **IDEM.**—A demand on the drawee of the payment of a draft does not charge the drawer, if the demand is not in accordance with the tenor of the draft. *Id.*

BOARD OF SUPERVISORS.

1. **SIGNING RECORDS OF A BOARD OF SUPERVISORS.**—The statute requiring the Chairman and Clerk of a Board of Supervisors to sign the record of its proceedings, does not invalidate such record as proof of the action of the Board if the Clerk and Chairman fail to sign, but has the effect merely of putting the party who desires to prove the official action of the Board to some additional trouble in establishing the handwriting of the entries, their contemporaneous character, and the official custody from which the book was produced. *People v. E. L. & Y. O. Co.*, 143.
2. **IDEM.**—The effect of the statute requiring the Clerk and Chairman of the Board of Supervisors to sign the record of its proceedings, is merely to make their signatures evidence identifying the minutes. *Id.*

See EVIDENCE, 5, 6.

BONDS.

1. **JOINDER OF DEFENDANTS IN ACTION ON BONDS.**—When an administrator, in the course of proceedings on the estate, gives two bonds, one when letters are issued, and the other when real estate is about to be sold, and the condition of each of the two bonds is the same, and the burden of the sureties in each is the same, the sureties on the two bonds, in an action on them, may be made joint defendants in the same action. *Powell v. Powell*, 235.
2. **LIABILITY AMONG SURETIES TO CONTRIBUTION.**—When an administrator gives two bonds, one when letters are issued, and the other when real estate is about to be sold, and each bond contains the same condition, and the sureties assume a common burden, they are liable to contribution *inter sese*. *Id.*
3. **SIGNING BY PRINTED FAC SIMILE.**—Coupons of bonds may be signed by a printed *fac simile* of the maker's autograph, adopted by the maker for that purpose, though not expressly authorized by statute. *Pennington v. Baehr*, 565.
4. **CONSTRUCTION OF PLEADING.**—In an action against the sureties on an official bond, if the defendants allege in their answer, that they signed with the express understanding that the bond should be signed by certain other persons, naming them, without stating that this understanding was with the obligee, it will be presumed that the understanding was with the principal in the bond. *Tiddell v. Halley*, 610.
5. **SURETIES ON AN OFFICIAL BOND.**—If sureties on an official bond sign with an express understanding with the principal in the bond, that certain other persons shall sign as sureties, and that unless such other persons sign, it shall not be delivered, a delivery of the bond to the obligee, without the signature of such other persons, does not render it invalid as to the sureties who do sign. *Id.*
6. **DELIVERY OF BOND.**—In an action on an official bond, the production of the bond in Court by the obligee, is sufficient evidence of its delivery. *Id.*

See SURETIES, 1, 2.

BOUNDARIES.

See EJECTMENT, 8.

BROKERS.

See EVIDENCE, 27.

CASES CITED AS AUTHORITY.

Ex parte Voll, 41 Cal. 29, in *Ex parte Hoge*, 3.
Page v. Fowler, 28 Cal. 611, and same case, 37 Cal. 106; *Farish v. Coon*, 40 Cal. 57; *Hayes v. Martin*, 45 Cal. 559; *Gardiner v. Miller*, 47 Cal. 570; *Hawthurst v. Lander*, 28 Cal. 331; and *Pickett v. Hastings*, 47 Cal. 270, in *McManus v. O'Sullivan*, 7.
Smith v. Athearn, 34 Cal. 506, in *Young v. Shinn*, 26.
The People v. Outeveras, ante, 19, in *People v. Ah Fat*, 62.

- Savings and Loan Society v. Austin**, 46 Cal. 415, and **Houghton v. Austin**, 47 Cal. 646, in **C. P. Railroad Co. v. Corcoran**, 65.
- Appeal of Houghton**, 42 Cal. 85, in **Spencer Creek W. Co. v. Vallejo**, 70.
- Hall v. Center**, 40 Cal. 68, in **Ballard v. Carr**, 74.
- The People v. Foren**, 25 Cal. 865; **People v. Bealoba**, 17 Cal. 389; **People v. Sánchez**, 24 Cal. 80; **People v. Haun**, 44 Cal. 96, and **People v. Long**, 89 Cal. 694, in **People v. Doyell**, 85.
- Boyd v. Blankman**, 29 Cal. 19, in **Guerrero v. Ballerino**, 118.
- Blood v. Light**, 38 Cal. 649, and **Mahoney v. Middleton**, 41 Cal. 41, in **Dreyfous v. Adams**, 181.
- Hart v. Plum**, 14 Cal. 148, in **The People v. Eureka Lake & Y. C. Co.** 148.
- Sands v. Pfeiffer**, 10 Cal. 258; **Tyler v. Decker**, Id. 435, and **Merritt v. Judd**, 14 Id. 59, in **Pennybecker v. McDougal**, 160.
- Raccoullat v. Sansevaln**, 82 Cal. 376; **Hancock v. Watson**, 18 Cal. 137; **McNeill v. Shirley**, 38 Cal. 202; **Saunders v. Clark**, 29 Cal. 299, and **Branan v. Mesick**, 10 Cal. 105, in **Sprague v. Edwards**, 239.
- O'Hale v. Sacramento**, ante 212, in **Krause v. Sacramento**, 221.
- Baker v. Joseph**, 16 Cal. 178, in **Silvey v. Hodgdon**, ante 185.
- Houghton v. Austin**, 47 Cal. 646, in **Ex parte Wall**, 279.
- People v. Webb**, 38 Cal. 467, in **The People v. Hunkeler**, 331.
- People v. Haun**, 44 Cal. 96, in **People v. Ah Wee**, 236.
- Ex parte McLaughlin**, 41 Cal. 212, in **People v. Cage**, 323.
- Hosmer v. Wallace**, 47 Cal. 461, in **Hess v. Bolinger**, 349.
- Thompson v. Smith**, 28 Cal. 532; **Shelby v. Houston**, 38 Cal. 422, and **Sanchez v. Loureyro**, 46 Cal. 641, in **Dennis v. Wood**, 361.
- People v. Parks**, 44 Cal. 105; **People v. York**, 9 Cal. 421, in **People v. Roach**, 382.
- Lorraine v. Long**, 6 Cal. 453; **Hough v. Waters**, 30 Cal. 309; **Ayres v. Bensley**, 32 Cal. 620, and **Hager v. Shindler**, 29 Cal. 55, in **Hills v. Sherwood**, 386.
- Treadway v. Semple**, 28 Cal. 652; **Semple v. Wright**, 32 Cal. 659; **Yates v. Smith**, 40 Cal. 662; **Semple v. Ware**, 42 Cal. 619, and **Gardiner v. Miller**, 47 Cal. 570, in **Hagar v. Spect**, 406.
- Sneed v. Osborn**, 25 Cal. 619, in **Columbet v. Pacheco**, 395.
- Martin v. Zellerbach**, 38 Cal. 300, in **San Francisco and N. P. R. Co. v. Bee**, 398.
- People v. Pico**, 20 Cal. 595, and **People v. Mariposa Company**, 31 Id. 196, in **People v. Cone**, 427.
- People v. Cone**, ante 427, in **People v. Hyde**, 431.
- McKinley v. Tuttle**, 42 Cal. 570, in **Baldwin v. Bornhelmer**, 432.
- Needham v. San José Railroad Company**, 37 Cal. 419; **Gay v. Winter**, 34 Id. 153; **Lyle v. Rollins**, 25 Cal. 437; **Terry v. Sickles**, 13 Cal. 427; **Pico v. Stevens**, 18 Cal. 376, and **Hicks v. Coleman**, 25 Cal. 122, in **Robinson v. The Western Pacific Railroad Company**, 409.
- People v. Pico**, 20 Cal. 595, and **People v. Mariposa Co.** 31 Id. 196, in **People v. Cone**, 427.
- Halleck v. Mixer**, 16 Cal. 474, and **Barfield v. Price**, 40 Cal. 535, in **Dabmann v. White**, 440.
- Kirkaldie v. Larrabee**, 31 Cal. 455, and **Clark v. Boyreau**, 14 Cal. 636, in **Bull v. Shaw**, 455.

Jenkins v. The California Stage Company, 22 Cal. 537; Loehr v. Latham, 15 Cal. 418; Pierson v. McCahill, 22 Cal. 127, and Hanchett v. Finch, 47 Cal. 192, in Edwards v. Southern Pacific Railroad Company, 460.
 Hodapp v. Sharp, 40 Cal. 69, in Buhne v. Chiam, 467.
 Ballard v. Carr, *ante* 74, in Howard v. Throckmorton, 488.
 Low v. The City of Marysville, 5 Cal. 214; Spring Valley Water Works v. San Francisco, 22 Cal. 442, and Polack v. San Francisco Orphan Asylum, *ante* 490, in San Francisco v. S. V. W. W. 498.
 Doyle v. Franklin, 40 Cal. 106, in Doyle v. Franklin, 537.
 Dewey v. Gray, 2 Cal. 374, in Jaffe v. Skae, 540.
 Wilson v. Cross, 33 Cal. 60, in Lander v. Beers, 546.
 Ex parte Hoge, *ante* 8, in People v. Perdue, 552.
 People v. Fair, 48 Cal. 187, in People v. McCarty, 557.
 People v. O'Connell, 28 Cal. 281; How v. Independence Co., 29 Id. 72, and Bailey v. Taafe, Id. 422, in Heerman v. Sawyer, 562.
 Columbet v. Pacheco, 46 Cal. 650, in Dinan v. Stewart, 567.
 Clark v. Baker, 14 Cal. 612; Clark v. Boyreau, 14 Id. 634; San Francisco v. Lawton, 18 Id. 465, and Kirkaldie v. Larrabee, 31 Id. 455, in Vallejo Land Association v. Viera, 572.
 Sherman v. Buick, 45 Cal. 656; Tyler v. Houghton, 25 Cal. 26, and Durfee v. Plaisted, 38 Cal. 83, in Thompson v. True, 607.
 Peralta v. Ginochio, 47 Cal. 459, in Abbey Homestead Ass. v. Willard, 617.
 Payne v. Treadwell, 16 Cal. 242, in Keller v. Ocana, 638.
 Pico v. Cuyas, 47 Cal. 175, in Pico v. Cuyas, 642.
 Kelly v. Larkin, 47 Cal. 58, and Altschul v. Doyle, *ante* 535, in Macy v. Davila, 646.

CASES AFFIRMED.

Collins v. Bartlett, 44 Cal. 371, in Pennybecker v. McDougal, 160.
 James v. San Francisco, 6 Cal. 528, in O'Hale v. Sacramento, 212.
 Treadway v. Semple, 28 Cal. 652; Semple v. Wright, 32 Cal. 659; Yates v. Smith, 40 Cal. 662, and Semple v. Ware, 42 Cal. 619, in Hagar v. Spect, 406.

CASES COMMENTED ON.

People v. Campbell, 40 Cal. 129, People v. Trim, 39 Cal. 75, and The People v. Schwartz, 32 Cal. 160, in The People v. Outeveras, 19.
 People v. Stanly, 47 Cal. 114, in People v. Collins, 277.
 People v. Gelabert, 39 Cal. 664, in People v. Ah Wee, 236.

CASES OVERRULED.

California State Telegraph Company v. Alta Telegraph Company, 22 Cal. 398, in San Francisco v. The Spring Valley Water Works, 498.

CASES NOT REPORTED.

2,936. Poorman v. Krebs; judgment and order affirmed on the authority of Jones v. Marks, 47 Cal. 248.
 4,274. The People ex rel. Love v. Bellmer; mandamus ordered.
 4,119. Bedee v. Bryte; judgment affirmed.
 4,140. Lovell v. Orcutt; judgment affirmed.

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- 4,095. Jones v. O'Connor; judgment affirmed.
4,145. Sprague v. Clanton; judgment affirmed.
4,185. Richardson v. Wood; judgment affirmed.
4,143. Swimley v. Wetzlar; judgment affirmed.
4,075. Kellogg v. Kellogg; judgment affirmed.
4,173. Naper v. Skinner; order reversed.
4,011. Welch v. Spring Valley Co.; judgment affirmed.
4,230. Murphy v. Duffy; judgment affirmed.
3,883. Partridge v. Stroecker; judgment and order denying a new trial reversed and cause remanded, on the authority of Shepard v. Colton, 44 Cal. 628, and Donnelly v. Tillman, 47 Cal. 40.
3,884. Partridge v. Schults; judgment and order denying a new trial reversed on the authority of Shepard v. Colton, 44 Cal. 628, and Donnelly v. Tillman, 47 Cal. 40.
3,885. Haskell v. Cunningham; judgment and order denying a new trial reversed on the authority of Shepard v. Colton, 44 Cal. 628, and Donnelly v. Tillman, 47 Cal. 40.
2,706. Rondel v. Fay; judgment and order affirmed.
3,826. Tompkins v. Bacon; judgment affirmed.
4,239. Foscaltina v. Goodrich; motion for a writ of mandate denied.
3,814. People v. Supervisors of Butte Co.; motion for writ of mandate granted.
10,081. People v. Murphy; judgment and order reversed, and cause remanded for a new trial.
4,112. Karr v. Parks; judgment affirmed.
4,208. Kirkland v. Petretius; judgment reversed and cause remanded, with directions to proceed to an account and dissolution of the co-partnership.
4,265. Springer v. Green; judgment reversed and cause remanded, with directions to overrule the demurrer to the petition.
2,692. Cottle v. Henning; judgment affirmed on the authority of Gardiner v. Miller, 47 Cal. 570.
2,693. Cottle v. Henning; judgment affirmed on the authority of Gardiner v. Miller, 47 Cal. 570.
2,694. Senter v. Baker; judgment affirmed on the authority of Gardiner v. Miller, 47 Cal. 570.
3,415. People v. Chambers; judgment affirmed.
3,922. Forster v. Pico; judgment affirmed.
3,953. Forster v. Pico; judgment affirmed.
4,172. Aguayo v. Higuera *et al.*; judgment reversed.
4,002. Irwin v. Towne; judgment and order denying a new trial affirmed.
4,256. Brady v. Whipple; judgment reversed.
4,320. Aguayo v. Higuera; order affirmed.
4,257. Brady v. Whipple; judgment reversed.
3,974. Nolan v. Fitzpatrick; judgment affirmed on authority of Hicks v. Murray, 48 Cal. 515.
3,181. Hills v. Burr; judgment and order affirmed.
4,336. Gates v. Salmon; judgment modified.
3,797. Slaughter v. Fowler; judgment and order denying a new trial reversed.
3,976. Estate of Bayliss; appeal dismissed.

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- 4,267. Bouff v. Parks; appeal dismissed.
4,399. Littlefield v. Delwas; appeal dismissed.
4,297. People ex rel. Jackson v. Sup. Kern Co.; appeal dismissed.
4,360. Clark v. Brown; appeal dismissed.
4,370. Lott v. McKee; mandate denied.
3,549. Himmelmann v. Sherman; judgment affirmed.
4,115. Dyer v. Lies; judgment affirmed.
4,398. Harrington v. Jones; appeal dismissed.
4,435. Meyer v. Knell; appeal dismissed.
4,436. Decker v. Meyer; appeal dismissed.
4,209. Dyer v. Nelson; judgment affirmed.
4,088. Himmelmann v. Townsend; judgment reversed.
4,174. McLeran v. McNamara; judgment affirmed.
4,194. Galland v. Galland; judgment affirmed.
4,254. Clinton v. Crystal; judgment affirmed.
3,763. Brigham v. Muller; judgment affirmed.
4,142. McCann v. Smith; judgment affirmed.
4,227. Miller v. West; appeal dismissed.
4,399. Green v. Lawyer; appeal dismissed.
2,948. Morgan v. Truette; appeal dismissed.
4,176. Jansen v. Lansdale; judgment reversed.
4,252. Bohall v. Dilla; judgment reversed.
4,331. Roscalina v. Doyle; judgment affirmed.
4,287. Bagley v. Sharp; judgment affirmed.
2,769. Pharris v. Downing; judgment affirmed.
10,112. Ex parte Wing; appeal dismissed.
4,407. English v. English; judgment affirmed.
4,071. Bailey v. Gorman; judgment affirmed.
4,411. McQuillan v. Donahue; judgment affirmed.
4,247. Van de Mark v. Peachy; judgment affirmed.
4,426. Rutherford v. Castro; appeal dismissed.
4,292. Culver v. Newell; judgment affirmed.
4,380. Miller v. Ellis; judgment affirmed.
4,163. Weinberg v. Ostroski; judgment affirmed.
4,164. Terry v. Fisk; judgment affirmed.
4,193. Christy v. Bellmer; judgment affirmed.
4,154. Estate of McKinley; judgment reversed.
4,238. Moore v. Bennett; judgment affirmed.
4,128. Pieratt v. Kennedy; judgment affirmed.
4,218. Carey v. Welch; judgment reversed.
4,221. Richardson v. Bush; judgment affirmed.
4,220. Tatum v. Bush; judgment affirmed.
4,463. Bailhache v. Pickle; appeal dismissed.
4,100. Shartzler v. Bennett; judgment affirmed.
4,186. Churchill v. Anderson; judgment affirmed.
4,216. Moss v. Treat; judgment reversed.
4,214. Fisher v. Pearson; judgment reversed.
4,408. Dyer v. Fitzmorris; judgment affirmed.
3,997. Regan v. Sharp; judgment affirmed.
3,952. Richardson v. Spanagel; judgment reversed.
10,087. People v. Collins; judgment affirmed.
4,196. Douglas v. Hunt; judgment affirmed.

- 8,807. *Reanda v. Fulton*; judgment reversed.
 8,789. *Clark v. Mendenhall*; appeal dismissed.

COLLECTOR OF INTERNAL REVENUE

See OFFICERS, 2.

COMMUNITY PROPERTY.

See SEPARATE PROPERTY; HUSBAND AND WIFE.

CONDITION SUBSEQUENT.

See CONVEYANCES, 4.

CONSTITUTIONAL LAW.

1. **FOURTEENTH AMENDMENT TO U. S. CONSTITUTION.**—The clause in the XIV. Amendment to the Constitution of the United States, which forbids a State to "deny to any person within its jurisdiction the equal protection of the laws," did not create any new legal rights, but operated upon legal rights as it found them established, and declared that such as they were in each State, they should be enjoyed by all persons alike. *Ward v. Flood*, 38.
2. **SPECIAL CASES.**—Proceedings for the condemnation of water to supply cities with pure water, and the right of way to conduct it, are "special cases" within the meaning of Section eight of Art. VI of the Constitution. *Spencer Creek Water Co. v. Vallojo*, 70.
3. **IDEM.**—The Constitution gives jurisdiction of "special cases" to the County Courts, unless the statute confers jurisdiction upon some other Court. *Id.*
4. **JURISDICTION OF SPECIAL CASES.**—The Legislature may confer jurisdiction of "special cases" upon the District Courts and the County Courts, but whether it may confer jurisdiction in such cases upon any other Court provided for by the Constitution, not decided. *Id.*
5. **IDEM.**—The Legislature cannot confer jurisdiction of "special cases" upon the County Judge, nor can it confer such jurisdiction upon any tribunal or officer, except one of the Courts mentioned in the sixth Article of the Constitution. *Id.*
6. **COUNTY JUDGES.**—The County Judge is not the County Court, and although the Legislature may authorize the Judges of Courts, at Chambers, to perform certain duties in respect to a cause, yet some Court must have jurisdiction of the cause. *Id.*
7. **POWER TO MAKE LAWS.**—The power to make laws, conferred by the Constitution on the Legislature, cannot be delegated by the Legislature to the people of the State, or to any portion of the people. *Ex parte Wall*, 279.
8. **STATUTE TO TAKE EFFECT UPON THE HAPPENING OF A FUTURE EVENT.**—Although a statute may be conditional so that its taking effect may depend upon a subsequent event which may be named in it, yet this event must

- be one which shall produce such a change of circumstances that the law makers, in their own judgment, can declare it wise and expedient that the law shall take effect when the event shall occur. *Id.*
9. **LEGISLATURE MUST PASS ON EXPEDIENCY OF A STATUTE.**—When the Legislature passes a law, it must pass entirely upon the question of its expediency; and it cannot say that a law shall be deemed expedient, provided that the people afterwards, by a popular vote, declare it to be expedient. *Id.*
 10. **IDEM.**—A statute to take effect upon a subsequent event, must, when it comes from the hands of the Legislature, be a law *in present* to take effect *in futuro*. On the question of the expediency of the law, the Legislature must exercise its own judgment, definitely and finally. *Id.*
 11. **LEGISLATURE CANNOT REFER A LAW TO THE PEOPLE.**—The Legislature has no power to refer a statute to the people, to decide by a popular vote whether it shall go into effect. *Id.*
 12. **IDEM.**—If a law is in existence making it a misdemeanor to retail liquors without a license, the Legislature must determine by a statute whether licenses shall be granted, and cannot refer the question of granting or refusing licenses to a popular vote. *Id.*
 13. **TOWN GOVERNMENTS.**—The Legislature of this State has not established a system of town governments, as required to do by section four, Art. XI, of the Constitution. *Id.*
 14. **IDEM.**—The Constitution is not self-executing. Town governments must be created by statute. *Id.*
 15. **IDEM.**—The words “system of town governments” used in the Constitution, were used with reference to town organizations in their general features like those of other States where town governments had been established when the Constitution was adopted. *Id.*
 16. **POWER OF TOWN GOVERNMENTS WHEN ESTABLISHED.**—When a system of town governments shall have been established by the Legislature, and when local town legislatures shall have been organized under that system, the Legislature may confide to such local legislatures the right to make local rules, but it cannot delegate to the people living within certain territorial limits, but who have no distinctive political character or governmental organization, the power to make laws. *Id.*
 17. **IDEM.**—The power to make laws must be exercised by the Legislature; that to make by-laws for a town, by the local legislature. *Id.*
 18. **ACT UNCONSTITUTIONAL IN PART AND GOOD IN PART.**—When a portion of an Act is constitutional, and another portion is unconstitutional, and the two are so inseparably blended together, as to make it clear that either clause would not have been enacted without the other, the whole Act is void. *San Francisco v. S. V. W. W.* 493.
 19. **GENERAL AND SPECIAL ACTS.**—An Act which purports on its face to be, and is in fact, a special Act, cannot be converted into a general Act, by a declaration of the Legislature in another Act, that it shall be considered a general Act. *Id.*
 20. **GRANT OF EASEMENT IN A STREET.**—A grant of an easement in a street, made by the Legislature to a corporation, is purely a grant of corporate

power, and therefore cannot be made to a private corporation by special Act. *Id.*

See CRIMINAL LAW, 34, 35; LIENS, 8; STREETS, 1, 2, 3, 4; CORPORATIONS, 1, 2, 3, 4, 5.

CONTRACTS.

1. **CONTRACT AGAINST GOOD MORALS.**—A contract entered into between a client and an attorney, in which the attorney undertakes to resist a motion for a new trial in a case in the District Court of the United States in which a Mexican grant of land has been confirmed to the client, and to procure an order making the decree of confirmation final, or to procure a dismissal of the appeal, should one be taken, and to receive for his services a portion of the land, is not *contra bonos mores*, if no concealment or improper practices were to be used, or were in fact used by the attorney, in performing the contract on his part. *Ballard v. Carr*, 74.
2. **WAIVER OF FULL PERFORMANCE OF CONTRACT.**—If a contract is entered into between an attorney and client, by which the attorney agrees to give his professional services in the matter of a confirmation of a Mexican grant of land in the United States courts; and, if the confirmation becomes final, the client agrees to convey to the attorney a portion of the land, and the attorney, after performing some service, is absent when the case is called in Court, and the client employs another attorney to assist in the matter, the client waives a full performance of the contract on the part of his attorney, if he still continues to recognize him as his attorney, and avails himself of his service. *Id.*
3. **CONTRACT AGAINST PUBLIC POLICY.**—A contract made by a County Surveyor with another person, by which the surveyor is to search out and survey swamp and overflowed land, and assist the other in effecting a purchase of it, and the other is to make the application to purchase, make the first payment of twenty per cent., and one year's interest in advance, and procure a certificate of purchase, and then convey one half to the Surveyor, is void, as against public policy. *Edwards v. Estell*, 194.
4. **SPECIFIC PERFORMANCE OF PAROL CONTRACT.**—If a Surveyor and another enter into a parol contract, by which the Surveyor is to search for and survey swamp lands, and the other is to pay the first installment of twenty per cent. purchase-money, and procure a certificate of purchase, and then deed one half to the Surveyor, the services performed by the Surveyor are not such part performance of the contract as to bring the case within the tenth section of the Statute of Frauds, and enable the Court to decree a specific performance. *Id.*
5. **INSERTION OF WRONG WORD IN CONTRACT.**—When it is apparent upon the inspection of a contract that, by a clerical error, a wrong word has been inserted, it will be read, in an action at law, as though the right word was in its place, and resort need not be had to a Court of Equity for a reformation of the instrument. *Sprague v. Edwards*, 239.
6. **AGREEMENT AGAINST PUBLIC POLICY.**—An agreement to procure witnesses to testify to a certain state of facts, is immoral, and against public policy. *Patterson v. Donner*, 369.

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7. **CONTEMPORANEOUS PAPERS.**—When, at the time of the execution of a deed, the grantee executes and delivers to the grantor a writing, in the nature of a defeasance, the two must be read as one instrument, both as between the parties, and as between the grantor and an assignee of the grantee, with notice of the defeasance. *Id.*
8. **COMPLAINT ON CONTRACT.**—A complaint on a written contract, concerning the building of a house, in which the defendant agrees to pay all bills against the house, or litigate the same before paying them if he deemed them unjust, must aver a breach of the condition. It is not sufficient to merely aver that the defendant has failed to pay. *Fisher v. Pearson*, 472.
9. **IDEM.**—If, in such action, the contract contains a clause by which the defendant agrees to pay all bills against the house, for which the plaintiff has not made himself personally liable, the complaint to recover such bills must aver that the plaintiff had not made himself personally liable for them. *Id.*
10. **PURCHASE BY ONE CORPORATION OF PROPERTY OF ANOTHER.**—If a corporation contracts with a city to supply it with pure fresh water for all purposes, except the sprinkling of streets, and the contract contains a clause, that if any other corporation receives permission to furnish the city with water on more favorable terms, the same terms shall be extended to the corporation contracting; and if another corporation is granted more favorable terms, and then purchases the rights and franchises of the old corporation, it does not thereby become bound by the contract, but may supply the city on the terms it enjoyed before the purchase. *San Francisco v. S. F. W. W.*, 493.
11. **PURCHASE OF LEASEHOLD INTEREST.**—If a party agrees in writing to sell to another a leasehold interest which he owns in property, of which he is in possession, and the transfer is delayed several months by the consent of the parties, the purchaser, in an action against him to recover the purchase-money, may claim compensation for the value of the use and occupation during the period of delay. *Jaffe v. Skae*, 541.
12. **CONTRACT IN THE ALTERNATIVE.**—If a person purchases property from another, and contracts in the alternative, to either pay the purchase-price at a day named, or reconvey the property, he must make his election on the day named, and if he does not, he loses his right of election. *Rewrick v. Goldstone*, 554.
13. **IDEM.**—When a contract is in the alternative, the party who is to perform must make his election on the day the promise is to be performed. He cannot wait until the next day. *Id.*
14. **CLAUSES IN CONTRACT MAKING CONVEYANCE NULL AND VOID.**—If there is a provision in a contract between the purchaser and seller of personal property, that the seller shall pay the purchase-price at the end of two years, or reconvey the property, and that, if the purchase-price is not paid, the conveyance shall become null and void, but that the purchaser may sell within two years, a sale within the two years prevents the property from vesting in the seller on a failure to pay the money. *Id.*

See EVIDENCE, 27, 28; MUNICIPAL CORPORATIONS, 1, 2.

CONTRIBUTION.

See BONDS, 2.

CONVEYANCES.

1. **PURCHASER OF LAND WITH CONSTRUCTIVE NOTICE OF PRIOR DEED.**—If one who buys without paying a valuable consideration, and with notice of a prior unrecorded deed, given by his grantor to another person, records his deed before the record of such prior deed, and, after the record of such prior deed sells to another, who pays a valuable consideration, and buys without actual notice of the prior deed, such last purchaser has constructive notice of the prior deed, and it will take precedence over his own. *Clark v. Sawyer*, 133.
2. **OUTSIDE LANDS IN SAN FRANCISCO.**—A conveyance made by the city of San Francisco to one in possession of outside lands merely has the effect to aid and assure the title already held. *Swain v. Duane*, 359.
3. **DEED WITH UNLAWFUL CONDITION SUBSEQUENT.**—If the grantee, at the time the deed is given, executes to the grantor a writing, stating that if the grantee shall not procure two witnesses to testify to a certain state of facts, the "deed shall be null and void," and that if the grantee shall procure such witnesses, then the deed shall take effect as a mortgage, the transaction constitutes a conveyance of the legal title with an unlawful condition subsequent. *Patterson v. Donner*, 369.
4. **IDEM.**—One who places the legal title to land in another, upon an unlawful condition subsequent, cannot recover it by suit at law, or in equity. *Id.*
5. **PURCHASER IN GOOD FAITH.**—If the grantee executes and delivers to the grantor a defeasance, one who buys from the grantee in good faith, and for a valuable consideration, by virtue of the Registration Act, takes a good title. *Id.*
6. **EFFECT OF FRAUDULENT CONVEYANCE.**—A conveyance made to defraud creditors vests the estate in the grantee, as against the grantor and his heirs and devisees. *Hills v. Sherwood*, 386.

See CONTRACT, 7; FRAUD, 1.

CORPORATIONS.

See STOCKS, 1, 2, 3; FRAUD, 1.

1. **PROPERTY OF A CORPORATION.**—The property of a railroad corporation is vested in its trustees, to be preserved by them as a fund to secure the creditors of the corporation. *S. F. & N. P. R. R. Co. v. Bee*, 398.
2. **FORMATION AND POWERS OF CORPORATIONS.**—Corporations in this State, except for municipal purposes, must be formed under general laws, and can exercise no powers except such as are conferred by these general laws. The Legislature cannot confer on such corporations any powers or grant them any privileges, by special Act. *San Francisco v. S. F. W. W.* 493.

3. **AN ACT GRANTING POWERS TO INDIVIDUALS WHEN THEY INCORPORATE.**—An Act which grants to individuals and their assigns certain powers and privileges, and then provides that the Act shall not take effect unless the persons to whom the grant is made shall, within a certain time, organize themselves into a corporation under existing laws, is a grant, not to the individuals as persons, but to the corporation when formed. *Id.*
4. **IDEM.**—Such Act is an attempt of the Legislature to confer powers and privileges upon a corporation by special Act. *Id.*
5. **IDEM.**—When such persons organize themselves into a corporation under the general laws, the corporation possesses no powers or privileges except such as are conferred by general laws. *Id.*
6. **CORPORATIONS TO SUPPLY A CITY WITH WATER.**—Private corporations, to supply a city with water, cannot be created by special Act, nor can the power to supply a city with water be conferred on a private corporation by special Act. *Id.*

See **CONTRACTS**, 10.

COUNTY SEAT.

See **ELECTIONS**, 1.

COUNTY SURVEYOR.

1. **COUNTY SURVEYOR.**—A County Surveyor is, under the statute, one of the agents of the State for the sale of swamp and overflowed lands. *Edwards v. Metell*, 194.

See **CONTRACTS**, 3, 4.

COUPONS.

See **BONDS**, 3.

COURTS.

See **STATUTORY CONSTRUCTION**, 1, 2, 3; **JURISDICTION**, 1, 2, 3.

CRIMINAL LAW.

1. **BAIL, PENDING AN APPEAL.**—A defendant who has been indicted and convicted of an offense for which the Court may, in its discretion, sentence him for a felony, or for a misdemeanor, is entitled to be admitted to bail, pending an appeal which is not frivolous, and is taken *bona fide*. *Ex parte Hoge*, 3.
2. **ACCESSORY BEFORE THE FACT.**—An accessory before the fact in the commission of a felony must be indicted, tried and punished, as a principal in the first degree. *People v. Outeveras*, 19.
3. **ACCESSORIES BEFORE THE FACT ARE PRINCIPALS.**—Accessories before the fact, that is to say, those who, not being present at the commission of the offense aiding and assisting, have, nevertheless, advised and encouraged its perpetration, are termed accessories by the statute, and under its provisions are made principals. *Id.*

4. **PRINCIPALS IN THE SECOND DEGREE AND ACCESSORIES.**—Principals in the second degree, and accessories before the fact, are all deemed chief actors; that is, principals in the first degree in the commission of the felony, and are to be indicted, tried, and punished as such principals. *Id.*
5. **AFFIDAVIT FOR CONTINUANCE.**—An affidavit for a continuance in a criminal case, on the ground of the absence of a witness, should distinctly state the facts to which the absent witness would testify. *People v. Ah Fat*, 62.
6. **IDEM.**—Query? In such case would a reference in the affidavit to the reporter's notes of the testimony taken on a former trial, be sufficient? *Id.*
7. **IDEM.**—An affidavit for a continuance in a criminal case is insufficient, if it fails to show that the testimony of the absent witness can be procured at the next or a succeeding term or if it shows that the same facts desired to be proved by the absent witness can be proved by other witnesses. *Id.*
8. **AIDING TO COMMIT MURDER MAKES ONE PRINCIPAL.**—If an indictment for murder charges the defendant with having been the actual perpetrator of the crime, he can be convicted if it is proved that he was present aiding and abetting the killing. *Id.*
9. **WHAT CONSTITUTES MURDER.**—A person is not guiltless of murder, because the one he kills has already been mortally wounded. *Id.*
10. **INSTRUCTIONS IN CRIMINAL CASE.**—If a defendant is charged in an indictment for murder with having committed the act, and there is testimony tending to show that he was the principal, and also testimony tending to show that he stood by aiding and assisting, an instruction to the jury which ignores the possible guilt of the defendant as a present aider and abettor of the killing, should not be given. *Id.*
11. **EVIDENCE OF CHARACTER OF WITNESS.**—If a defendant introduces evidence on a trial for murder, tending to show that one of the people's witnesses was suborned, and had been paid for his testimony, the prosecution in rebuttal may introduce testimony to show the good character of the witness, for truth and veracity. *Id.*
12. **ASSAULT WITH INTENT TO COMMIT ROBBERY.**—When it appears on the trial that a defendant charged with an assault with intent to commit robbery, presented to a traveler on the highway a cocked pistol, and said, "Stop, or I will shoot you," it is the province of the jury to determine from the acts of the defendant, and from all the surrounding circumstances, whether the defendant intended to commit robbery or was actuated by some other purpose. *People v. Woody*, 80.
13. **ERROR AFTERWARDS CURED.**—Error of the Court in refusing, in a criminal case, to allow the defendant to ask a witness a question, is cured by afterwards permitting the witness to answer the same question. *Id.*
14. **INDICTMENT — WHEN MAY BE FOUND.**—A Grand Jury in Sierra County, convened at a term of the County Court, commencing on the second Monday in December, 1872, had jurisdiction to find an indictment after the Code of Civil Procedure went into effect, January 1, 1873. *People v. Doyell*, 85.
15. **MURDER IN THE SECOND DEGREE.**—A homicide which is unlawful and ac-

- accompanied with malice, but not deliberate and premeditated, is murder in the second degree. *Id.*
16. **POSSESSION OF STOLEN PROPERTY.**— In order that the possession of stolen property may be made available toward a conviction, other circumstances indicative of guilt must be shown. *People v. Norega*, 128.
 17. **ERROR AGAINST APPELLANT.**— Error, in excluding evidence against a defendant offered by the people, cannot be taken advantage of by counsel for the people, upon an appeal by the defendant. *Id.*
 18. **INDICTMENT AS PRINCIPAL AND ACCESSORY.**— The Code has not changed the rule that an indictment may, in one count, charge the defendant as principal, and in another count charge him as an accessory. *People v. Shepardson*, 189.
 19. **CRIME OF ROBBERY.**— A person who receives money obtained by robbery, with a knowledge of the manner in which it was obtained, cannot be convicted of the crime of robbery. *Id.*
 20. **NUMBER OF COUNSEL IN CRIMINAL CASE.**— In a capital criminal case, the Court may, in its discretion, allow more than two counsel to address the jury, either on behalf of the people or the defendant. *People v. Ah Wee*, 236.
 21. **FAILURE TO ASK AN INSTRUCTION TO THE JURY.**— A defendant, in a criminal case, cannot complain that the Court did not instruct the jury upon a point in issue, unless he asked an instruction on the point, and it was refused. *Id.*
 22. **ARREST OF JUDGMENT IN CRIMINAL CASE.**— If a committing magistrate, before whom an examination is about to be held, with the assent and concurrence of the district attorney, promises a person under arrest, that if he will become a witness for the people, against other persons then under arrest for the same offense, he shall be acquitted, and the defendant, induced by such promise, testifies and implicates himself, and is afterwards indicted, these facts do not furnish ground for a motion in arrest of a judgment of conviction. *People v. Indian Peter*, 250.
 23. **IDEM.**— The only grounds on which a motion in arrest of judgment in a criminal case can be based, are those mentioned in the statute. *Id.*
 24. **DISCHARGE OF PRISONER WHEN ON TRIAL.**— A promise of immunity from punishment, made by a prosecuting attorney, or a committing magistrate, to a person charged with a crime, if he will become a witness for the people against others charged with the same crime, furnishes no ground for discharging the prisoner from prosecution, when on trial. *Id.*
 25. **IDEM.**— The discharge of a prisoner, that he may be a witness against others, must be made at the trial, before the defendant has gone into his defense, by the Court, either of its own motion, or upon the application of the district attorney. *Id.*
 26. **IDEM.**— A defendant, in a criminal case, cannot be discharged from the indictment, without a trial, except in the case provided for by the statute. *Id.*
 27. **TRANSCRIPT IN CRIMINAL CASE.**— A statement of the evidence in a criminal case, which is not a part of the bill of exceptions certified by the judge, will not be taken into consideration by the Appellate Court. *People v. Brown*, 253.

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28. **POSSESSION OF STOLEN PROPERTY.**— There is no error in charging the jury that the mere possession of stolen property will not justify a verdict of guilty, but there must be proof of other facts tending to establish the guilt of the accused; *provided*, all the facts in evidence prove defendant's guilt, beyond a reasonable doubt. *Id.*
29. **JURY IN CRIMINAL CASE.**— A jury in a criminal case must, within the meaning of the Constitution, consist of twelve men. The defendant cannot consent to be tried by a jury composed of a less number. *People v. O'Neil*, 257.
30. **INDICTMENT.**— An indictment which charges the defendant with feloniously assaulting a female, by throwing her on her back, and attempting to have sexual intercourse with her, with intent to outrage her person, does not charge an assault with intent to commit rape. *Id.*
31. **ALLEGATION IN INDICTMENT.**— An indictment must allege that the offense was committed within the county in which the indictment is found. *Id.*
32. **EVIDENCE OF FLIGHT OF CRIMINAL.**— If four men jointly commit a robbery by taking money from the person of another, and are immediately arrested, and one of them breaks away from the officers and runs some distance before he is retaken, on the separate trial of one of the four who did not flee, evidence of the flight of the other may be received for the purpose of showing that, after his arrest, he had the opportunity to throw away the money, if, after being taken to the prison, no money is found on the persons of the robbers. *People v. Collins*, 277.
33. **EVIDENCE ADMISSIBLE FOR A PARTICULAR PURPOSE.**— If, on the trial of one charged with a crime, evidence which is competent only for a particular purpose is admitted generally, and the counsel for the defendant fails to ask the Court to limit the evidence to the purpose for which it was competent, or to ask a charge to the jury to that effect, the defendant cannot afterwards complain that the testimony was inadmissible for some other purpose. *Id.*
34. **WHEN PERSON ACCUSED OF CRIME IS "IN JEOPARDY."**— When a person is placed on trial upon a valid indictment, before a competent Court and a jury, he is in jeopardy within the meaning of the constitutional provision which declares that "no person shall be subject to be twice put in jeopardy for the same offense. *People v. Cage*, 323.
35. **IDEM.**— In such case, the discharge of the jury without a verdict, unless by consent of the defendant, or from some unavoidable accident or necessity, is equivalent to an acquittal. *Id.*
36. **IDEM.**— Among these unavoidable necessities are, the inability of the jury to agree after a reasonable time for deliberation and the close of the term of the Court. *Id.*
37. **DISCHARGE OF JURY IN CRIMINAL CASE.**— The discretion of the Court in the discharge of a jury for inability to agree must be exercised upon some kind of evidence, and the judgment of the Court on the point should be expressed in some form upon the record. *Id.*
38. **IDEM.**— A report made by the Sheriff to the Court that the jury say they are unable to agree, is not evidence upon which the Court can act in

- discharging the jury for inability to agree. The proper course is to call the jury into Court, and have them announce their inability in the presence of the Court. *Id.*
39. **WHEN DISCHARGE OF JURY AMOUNTS TO AN ACQUITTAL.**—If, while a jury is out deliberating upon their verdict in a criminal case, and before the expiration of the term, the Judge, without calling the jury into Court, adjourns the Court for the term, it is equivalent to an acquittal of the defendant. *Id.*
40. **DEFENSE UNDER PLEA OF NOT GUILTY.**—An acquittal of a defendant in a criminal case by a discharge of the trial jury without a verdict, may be given in evidence on a subsequent trial of the defendant, under a plea of not guilty. *Id.*
41. **BEING TWICE IN JEOPARDY FOR A CRIME.**—If a person is indicted for manslaughter, and on his trial, the Court, without the consent of the defendant, discharges the jury because it is of opinion that the evidence shows that the defendant is guilty of murder, and the defendant is again indicted for murder for the same killing, he is "twice put in jeopardy for the same offense," and is entitled to an acquittal. *People v. Hunobler, 331.*
42. **PROOF OF VENUE OF CRIME.**—Even if no witness testifies in so many words to the venue of the crime, as alleged in the indictment; yet, if the whole testimony taken together leaves no room for a reasonable doubt on this point, the venue is sufficiently proved. *People v. Manning, 335.*
43. **PROOF OF VENUE IN CRIMINAL CASE.**—In a criminal case, the prosecution must prove that the offense was committed in the county charged in the indictment. *People v. Roach, 382.*
44. **DISTINCTION BETWEEN MURDER AND MANSLAUGHTER.**—Whether a homicide amounts to murder or to manslaughter merely, does not depend upon the presence or absence of the intent to kill. *People v. Freel, 436.*
45. **IDEM.**—In either murder or manslaughter, there may be a present intention to kill at the moment of the commission of the act. *Id.*
46. **SENTENCE TO IMPRISONMENT.**—The Court must not sentence a prisoner convicted of a criminal offense to imprisonment for a term longer than that fixed in the Statute for the punishment of the crime of which he stands convicted. *People v. Riley, 549.*
47. **IDEM.**—If the Court imposes a longer term of imprisonment than that fixed by the Statute for the offense, the Supreme Court, on appeal, will reverse the judgment, and direct the Court below to proceed to judgment on the verdict. *Id.*
48. **DEFECT IN INDICTMENT.**—If an indictment is not signed or endorsed by the foreman of the Grand Jury, the defendant must take advantage of the defect by a motion to set it aside. If he goes to trial on a plea of not guilty, he waives the defect. *People v. Johnston, 549.*
49. **EVIDENCE ON TRIAL FOR BURGLARY.**—The prosecution, in an indictment for the crime of burglary alleged to have been committed by breaking and entering the room of D. with the intent to steal, cannot prove that the defendant entered a room of D. different from that alleged in the indictment, and at a time different from that alleged in the indictment, and stole money from D. *People v. Barnes, 551.*

50. **BAIL AFTER JUDGMENT IN CRIMINAL CASE.**—The fact that a prisoner has been convicted of the crime of manslaughter, and sentenced, does not, in law, afford a reason why the District Judge should refuse to entertain an application to admit him to bail, pending the appeal. *People v. Perdue*, 552.
51. **IDEM.**—It is a matter of discretion, whether a prisoner, who has been convicted of manslaughter, and sentenced, should be admitted to bail pending an appeal taken by him. *Id.*
52. **TO WHOM APPLICATION FOR BAIL SHOULD BE MADE.**—In practice, the power to admit a prisoner to bail, pending an appeal taken by him, ought not to be exercised by the Supreme Court in the first instance, nor until after the determination upon its merits, of an application for bail, before the Judge who tried the cause. *Id.*
53. **CHALLENGE TO JUROR.**—If the prosecution, in a criminal case, pass the jury to the defendant, who declines to make any challenge, the prosecution may then interpose a peremptory challenge to a juror, before he is sworn. *People v. McCarty*, 557.
54. **ARREST OF JUDGMENT.**—A motion in arrest of judgment must be founded on some of the defects mentioned in section one thousand and four of the Penal Code. *Id.*
55. **VERDICT IN CRIMINAL CASE.**—An informal verdict in a criminal case is sufficient, if it can be clearly understood as being a general verdict of guilty or not guilty. *Id.*
56. **IDEM.**—A verdict reading, "We the undersigned, jurors, find a verdict of murder in the second degree," is a good verdict of guilty of the crime of murder in the second degree. *Id.*

See JURY, 1, 2, 3, 4, 5.

CRIMINAL PRACTICE.

See JURY, 1, 2, 3, 4.

CUSTOM.

See EVIDENCE, 27.

DAMAGES.

1. **DAMAGES FOR ASSAULT AND BATTERY.**—In an action for an assault and battery, the jury, in estimating the damages, cannot take into consideration the plaintiff's expenses in the prosecution of the suit. *Howell v. Scoggins*, 355.
2. **EXCESSIVE DAMAGES.**—A verdict of ten thousand dollars for an injury by a railroad car which necessitates the amputation of an arm, where the defendant was guilty of gross negligence, is not a case of excessive damages. *Robinson v. W. P. R. R. Co.*, 409.

See RELEVIN, 1; MUNICIPAL CORPORATIONS, 1, 2; RAILROADS, 10.

DEEDS.

1. **CONSTRUCTION OF DEED.**—If the owner of a Mexican grant of land makes a conveyance of a part of the same, and, in the deed, describes one

boundary of the land conveyed, as running parallel with the southern line of the ranch "according to the survey of the same made by the United States Surveyor-General of said State," and, at the time the deed is delivered no survey has been made and approved by the Surveyor-General, but an experimental survey had been made by the Deputy of the Surveyor-General, who had the field notes in his possession, but the grantees in the deed had no knowledge of this experimental survey, the description in the deed will be held to refer to the final survey of the ranch to be thereafter determined by the Federal authorities. *Frost v. Toomes*, 28.

2. **RECITALS IN SHERIFF'S DEED.**—A Sheriff's deed need not recite the judgment and execution under which he acted. It is sufficient if it appear in the deed that the sale was made under the authority of a judgment and execution; that is, if the deed recites sufficient to show the authority of the sheriff to sell. *Clark v. Sawyer*, 138.
3. **STATUTE REQUIRING RECITALS IN SHERIFF'S DEEDS.**—The statute requiring recitals in a Sheriff's deed was not intended to make deeds void which do not contain them, but was only intended to make the recitals evidence of the facts recited; and when such recitals are full, they dispense with the necessity of introducing the judgment and execution in evidence. *Id.*
4. **IDEM.**—So far as such statute requires recitals beyond what are necessary to show the authority of the officer to sell, it is merely directory. *Id.*
5. **LEGAL EFFECT OF A DEED.**—The legal effect of a deed will be determined from the instrument itself, construed in the light of surrounding circumstances. *Sprague v. Edwards*, 239.
6. **ACKNOWLEDGMENT OF THE DEED.**—The presumption is, that the certificate of the notary of the acknowledgment of a deed states the facts. *Baldwin v. Bornheimer*, 438.

See **NEW TRIALS**, 5; **EVIDENCE**, 9, 23; **TRUSTS**, 2, 8; **EJECTMENT**, 7; **CONTRACTS**, 7; **DEFEASANCE**, 1.

DEFAULT.

1. **SETTING ASIDE A DEFAULT.**—An order setting aside a default and judgment must prescribe the payment of the previous costs, as a condition precedent. *Heermans v. Sawyer*, 562.

DEFEASANCE.

1. **DEFEASANCE.**—If at the time of the execution of a deed, the grantee executes and delivers to the grantor a writing, stating that he has received the deed as security for money to be paid to him in consideration of his thereafter procuring witnesses to testify to a certain state of facts, it is not a defeasance, and the transaction does not constitute a mortgage. *Patterson v. Donner*, 369.

See **CONTRACTS**, 7.

DEPOSITIONS.

1. **DEPOSITION OF A WITNESS OUT OF THE STATE.**—In an application for a commission to take the deposition of a witness residing out of the State, it is sufficient to serve on the opposite party the copy of an order of the Court or Judge, requiring the party to show cause on a day named why a commission should not issue. No other notice is required. If the day named is less than the five days required for notice by the statute, the order and the issuing of the commission are equivalent to an order shortening the time. *Dabmann v. White*, 439.
2. **IDEM.**—The commission to take a deposition need not state on its face that the person to whom it issued was a Judge or a Justice of the Peace. *Id.*
3. **IDEM.**—The presumption is, that on granting the commission, the Judge who ordered it performed his duty, and directed it to a person who was qualified to execute it. *Id.*

See NEW TRIALS, 17.

EASEMENT.

See STREETS, 3, 4, 5; CONSTITUTIONAL LAW, 20.

EJECTMENT.

1. **PRESUMPTION AS TO TITLE ARISING FROM POSSESSION.**—The mere fact that a party held possession of Pueblo land within the limits of the city of San Francisco for the period of several years, prior to 1861, and then died, raises no presumption, in an action brought by his intestate to recover the land, that this possession was connected with the title of the city. *McManus v. O'Sullivan*, 7.
2. **PUEBLO LAND IN SAN FRANCISCO.**—A person who was in the mere naked possession of Pueblo land in San Francisco, and who did not hold the same under a grant from the authorities of the Pueblo, was not a beneficiary under the decree of the Circuit Court confirming said lands to the city. *Id.*
3. **IDEM.**—A person who was in possession of Pueblo lands in San Francisco prior to 1861, but who was ousted therefrom, did not become a beneficiary under the Act of Congress of March 8th, 1866, and ordinance No. 800 of said city, and the Act of the Legislature confirming it, unless he had recovered possession. *Id.*
4. **EJECTMENT BY TRUSTEE TO RECOVER TRUST ESTATE.**—A trustee to whom land is conveyed by a debtor, with power to sell and use the proceeds in payment of the debt and the expenses of the trust, and whose powers and duties are prescribed by a declaration of trust in writing, and who merely holds the title in trust as security for the debt, cannot maintain ejectment against the *cestui que trust*, or his assigns, to recover the land. *Tyler v. Granger*, 259.
5. **EVIDENCE IN EJECTMENT.**—In ejectment, a deed to the defendant, executed subsequent to the commencement of the action, is admissible in evidence on his behalf, if a supplemental answer is filed, setting up the title acquired through the deed. *Roper v. McFadden*, 346.

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6. **DEED TO MARRIED WOMAN FOR CONSIDERATION.**— A deed to a wife, made by a person other than the husband, for a valid consideration paid to the grantor by the husband, which conveys the property to the grantee "as her separate property, and to and for her sole and separate use," constitutes the premises, in law, the separate estate of the wife, and the husband cannot maintain ejectment for their recovery. *Swain v. Duane*, 358.
7. **LEGAL EFFECT OF DEED IN EJECTMENT.**— If the husband brings ejectment, and relies on a deed to his wife making the demanded premises her separate property, as a muniment of title, and no equitable defense is set up, neither party can make enquiry for the purpose of controlling or defeating the legal effect of the deed. *Id.*
8. **DIVISION FENCE—ESTOPPEL.**—When a fence is built for a division fence, and is acquiesced in as such for sixteen years, the parties are estopped from controverting the correctness of its location. *Colembet v. Pacheco*, 395.
9. **EVIDENCE IN EJECTMENT.**— If, after the defendant in ejectment has answered, raising issues on the question of title, the attorney for the defendant appears for a person not made a defendant in the complaint, and, by stipulation, the answer on file is considered as the answer of the person for whom the attorney thus appears, the party who thus appears must connect himself by evidence with the title of the original defendant, before he can introduce evidence as to the issues. *Baldwin v. Bornheimer*, 488.
10. **EJECTMENT.**— The plaintiff in ejectment can recover only on the legal title. *Buhne v. Chism*, 467.
11. **PLEADINGS IN EJECTMENT.**— If a complaint in ejectment contains immaterial and irrelevant allegations, which would be stricken out on motion, the defendant, in his answer, need not controvert them. *Doyle v. Franklin*, 537.
12. **DEFENSE IN EJECTMENT.**— The defendant in ejectment need only defend against the material allegations in the complaint, that is, the allegations material to constitute a complaint in ejectment. *Id.*
13. **EVIDENCE OF TITLE IN EJECTMENT.**— On the trial of an action to recover the possession of land, the production by the plaintiff of a lease of the demanded premises, executed by him to the defendant, and signed by the defendant, the term of which expired before the commencement of the action, makes out a *prima facie* case of title in the plaintiff. *Abbey Homestead Ass. v. Willard*, 614.
14. **LEASE, EVIDENCE OF TITLE IN THE PLAINTIFF.**— In ejectment, the production of a lease executed by the defendant is *prima facie* evidence of title in the plaintiff, and is not overcome by evidence on behalf of the defendant that he was in possession when he executed the lease. The defendant must not only show possession, but paramount title, in order to recover the estoppel created by the lease. *Id.*
15. **REBUTTING EVIDENCE IN EJECTMENT.**— If the plaintiff in ejectment rests on proof of a lease executed by the defendant, and the defendant then proves adverse possession, the plaintiff, in rebuttal, may introduce evidence of the arraignment of his title. *Id.*

16. **PROOF OF OUSTER IN EJECTMENT.**— If the answer in ejectment denies an ouster, and the plaintiff fails to prove it, the defendant is entitled to a nonsuit. But if, in such case, the Court denies the nonsuit, and the defendant afterwards proves that he is in possession of the demanded premises, the error is cured. *Id.*
17. **COMPLAINT IN EJECTMENT.**— In a complaint to recover possession of land it is sufficient to aver that the plaintiff owns the same, and that the defendant is in possession adversely to the plaintiff, and withholds the same. *Keller v. Ocana*, 638.

See **ESTOPPEL**, 3; **EQUITY**, 9.

ELECTIONS.

1. **ELECTION FOR REMOVAL OF COUNTY SEAT.**— When an election is held for the removal of a County Seat, under Chapter II, Title I, Part IV, of the Political Code, and a majority of the electors vote in favor of retaining the County Seat where it is, the Board of Supervisors may, at any time, upon the presentation of a proper petition, order a second election for the same purpose. The statute does not restrict the number of elections which may be held, so long as the place of the County Seat is not changed. *Atherton v. Sup. San Mateo Co.*, 157.

EMINENT DOMAIN.

See **CONSTITUTIONAL LAW**, 2, 3.

1. **ASSESSING DAMAGE FOR TAKING PRIVATE PROPERTY.**— Where commissioners are appointed to assess compensation for the taking of private property for public uses, and it is claimed that the Commissioners have not assessed "compensation for each piece of land taken, and for each source of damage, separately," an objection to the action of the Commissioners on that ground must be taken before the Commissioners themselves, to afford them an opportunity to obviate the objection; and if they refuse, an exception must be noted. If the party fails to make the objection before the Commissioners, he cannot move to set aside the report on that ground, in the Court to which the report of the Commissioners is made. *Matter of Clear Lake Water Co.*, 586.

EQUITY.

1. **SPECIFIC PERFORMANCE OF CONTRACT.**— A Court of Equity will not, for the want of mutuality, refuse to enforce the specific performance of a contract between an attorney and client, by which the attorney undertakes to give his professional services in resisting a motion for a new trial made in the District Court of the United States, in a case where a Mexican grant of land has been confirmed to the client, and to procure the dismissal of an appeal if one is taken, and the client agrees to convey to the attorney a portion of the land, if he succeeds in his undertaking. *Ballard v. Carr*, 74.
2. **HE WHO ASKS EQUITY MUST DO EQUITY.**— If a party appeals to a Court of Equity for the specific performance of a contract, he must himself do equity, and submit to such terms as a Court of Equity will impose. *Id.*

3. **EQUITY BETWEEN ATTORNEY AND CLIENT**—If an attorney asks the specific performance of a contract to convey to him land for his professional services, and the client after making the contract employed other counsel to assist, in the absence of the attorney, equity will allow the client compensation for the services of the counsel, and the amount of the compensation is the value of the services rendered. *Id.*
4. **SUIT IN EQUITY BY PARTNER FOR AN ACCOUNTING.**—If two men are in partnership for a term of years in the care and one half the increase of a flock of sheep, under a contract with the owner of the flock, who receives the other half of the increase, and the owner buys the interest of one through fraudulent representations that he has purchased the interest of the other, and then takes possession of the flock and increase, the remedy of the partner who has not sold, is in equity for an accounting, and in such action the partner who sold is a necessary party. In such case an action at law for damages does not lie. *Blood v. Fairbanks*, 171.
5. **SUIT IN EQUITY TO HAVE A PRE-EMPTION PATENTEE DECLARED A TRUSTEE.**—In a case where two parties are contesting pre-emption claimants before the United States land officers, and the land is awarded to one and the patent issued to him, and the other then files a bill in equity to have the Court adjudge the patentee his trustee, and to compel him to make a conveyance of the legal title, the plaintiff must show, first, that he possessed all the necessary qualifications of a pre-emptor, for without these qualifications he has no standing in Court; second, that the defendant did not possess those qualifications, and that the land officers, in deciding that he did, were imposed on and deceived by fraudulent practices and false testimony used before them, and procured by the defendant. *Burrell v. Haw*, 222.
6. **IDEM.**—The Courts will not pass on the sufficiency of the evidence upon which the decision of the land officers was based in such case, but, it must be shown that their decision was induced by fraudulent practices of the defendant, whereby the plaintiff was deprived of his right to pre-empt. *Id.*
7. **IDEM.**—In such case, the fact that the patentee was not a citizen, and swore falsely on that point in his declaratory statement, is not sufficient to show fraudulent practices on his part on the question of citizenship; but it must appear that he produced witnesses who swore falsely on that point, and thereby deceived the land officers. *Id.*
8. **WHEN NOT ENTITLED TO EQUITABLE RELIEF.**—No person can complain in equity of the fraudulent practices of another, unless he has been injured by such practices. *Patterson v. Donner*, 369.
9. **RELIEF IN EQUITY.**—A judgment at law against the defendant in ejectment is not a bar to a bill in equity addressed by the defendants in the ejectment suit to the equity side of the Court, if the relief sought is purely of equitable cognizance. *Hills v. Sherwood*, 386.
10. **EQUITABLE DEFENSE IN EJECTMENT.**—Although, when the defendants in ejectment are the executors of the estate of the grantor of the plaintiff, they may, perhaps, maintain their possession of the demanded premises on the ground that the deed of the testator to the plaintiff is fraudulent

and void as against creditors of the estate; yet they cannot claim a decree annulling the deed, except upon the allegations of a cross complaint praying for affirmative relief. *Id.*

11. **IDEM.**—Before a case can be considered beyond the reach of a Court of Equity, it must be made to appear that the legal remedy would be adequate and complete. *Id.*
12. **WHO MAY SUE IN EQUITY TO SET ASIDE FRAUDULENT DEED.**—A creditor of the estate of a deceased person whose claim has been established, may maintain an action in equity to reach property fraudulently conveyed by the testator, in his life-time. *Id.*
13. **WHAT RELIEF MAY BE GRANTED IN EQUITY.**—When the testator, during his life-time, makes a deed of his land to defraud his creditors, and a creditor of the estate, whose claim is established, files a bill in equity to set aside the deed as fraudulent, and there is no other creditor of the estate, the Court may decree a sale of the property and an application of the proceeds to pay the plaintiff's debt. *Id.*
14. **EQUITY DOES NOT RELIEVE THOSE WHO HAVE BEEN GUILTY OF FRAUD.**—The party who comes into a Court of Equity to enjoin a sheriff from selling real estate on an execution against the plaintiff's grantor, cannot obtain relief, if his purchase is tainted with fraud. *S. F. & N. P. R. R. Co. v. Bee*, 398.
15. **SUIT FOR SPECIFIC PERFORMANCE.**—Although, when an attorney contracts to perform legal services for a client in consideration of receiving a portion of the property about which the litigation is to be carried on, he cannot maintain an action for a specific performance while the contract remains unperformed on his part; yet, if he can show a substantial performance on his part, he is as fully entitled to maintain such action as he would be if the agreement on his part had been for the payment of money. *Howard v. Throckmorton*, 482.
16. **SPECIFIC PERFORMANCE OF A CONTRACT.**—If a client contracts with his attorney to convey to him a portion of the property in litigation, in consideration of legal services to be rendered, the facts, that the property afterward enhances in value, and that such enhancement is, in a material degree, the result of the labor and money of the client, are no valid objection to a decree for a specific performance of the contract. *Id.*
17. **FRAUDULENT SALE OF PROPERTY**—When a father, for the purpose of defrauding his creditors, purchases property and causes the same to be conveyed to a daughter, a Court of Equity will, at the suit of a judgment creditor, declare the deed fraudulent and void. *Lander v. Beers*, 546.

See **ROADS AND HIGHWAYS**, 1, 2; **ATTORNEY AT LAW**, 4; **LANDS**, 7; **WILL**, 3;
WATER COMMISSIONERS, 1; **PLEADINGS**, 5.

ERROR.

See **NEW TRIALS**, 6.

ESTATES OF DECEASED PERSONS.

1. **APPLYING SPECIAL BEQUEST TO PAYMENT OF DEBTS.**—If the Probate Court makes an order applying the proceeds of the sale of a special bequest,

made by the testator, to the payment of a debt, the executors cannot object that there are other special bequests besides that thus applied. *Estate of Moulton*, 192.

2. **IDEM.**— If a special bequest is applied to the payment of a debt, and there are other special bequests, the remedy of the one whose special bequest is thus applied, is to seek contribution from the others. *Id.*
3. **IDEM.**— If the real estate has been sold, and if an order is made by the Probate Court applying the proceeds of a special bequest of personal property to the payment of a debt, it will be assumed that the personal estate not specially bequeathed had been thus applied, and that it was necessary thus to apply the proceeds of the special bequest, if the record does not show the contrary. *Id.*
4. **IDEM.**— When the Probate Court makes an order applying the proceeds of a special bequest to the payment of a debt, and the will is not in the record, it will not be assumed that the Probate Court erred, in adjudging that the intention of the testator could be carried into effect, and yet sell the special bequest. *Id.*
5. **SALE OF LAND BY ORDER OF PROBATE COURT.**— When a sale of the real estate, left by an intestate, is made by an administrator, and a person other than the purchaser afterwards offers to take the land at a price at least ten per cent. greater than that bid, and the Probate Court for this reason refuses to confirm the sale, it may, in its discretion, either order a new sale or accept the bid of the person who thus offers an increased price. *Griffin v. Warner*, 383.
6. **IDEM.**— When, in such case, the Court refuses to confirm a sale, it may continue the matter for further proceedings, and, at a subsequent term, either accept the bid of the person who offers an increased price, or order a new sale. *Id.*
7. **POWER OF PROBATE COURT OVER ITS ORDERS.**— When, in an order of the Court, refusing to confirm a sale of land made by an administrator, because an offer is made of at least ten per cent. more, a clause is inadvertently included declaring the sale null and void, the Court may, at a subsequent term, accept the new bid. *Id.*
8. **ACCOUNTS OF AN EXECUTOR.**— If, by the terms of a will, the executor is directed to keep invested the money belonging to the estate in first-class real estate security, and the executor loans said money upon real estate security which is not good, he cannot, in his account, charge the estate with the expenses of litigation, attorney's fees, etc., in relation to the loan; nor can such items be allowed to the executor in the settlement of his accounts. *Estate of James Holbert*, 627.
9. **IDEM.**— In such case the executor, in the settlement of his accounts, is to be charged with the sum lost by the loan; but if the loan was made in good faith, he must not be charged with the stipulated rate of interest upon the sum lost, nor even with the statutory rate of interest, unless it appears that he could, with ordinary diligence, have loaned the money to others at that rate. *Id.*
10. **IDEM.**— In case of such a loan, the advice of his attorney cannot shield the executor from responsibility, if the money was loaned on land

already encumbered, and no examination was made of the records, and no abstract was furnished to the attorney upon which his opinion could be had. *Id.*

See BONDS, 1, 2; ESTOPPEL, 2; EQUITY, 12; EVIDENCE, 22.

ESTOPPEL.

1. **APPROVAL OF A MEXICAN GRANT.**—If the claimant of a Mexican grant of land which gives a perfect title, presents the same to the Board of Land Commissioners for confirmation, under the Act of Congress of 1851, and it is confirmed and surveyed, and the survey is approved and a patent issued, but by the survey a portion of the land included within the juridical measurement of the Mexican authorities is excluded, the claimant is estopped from afterwards asserting title to the land not included in the survey made by the United States. *Cassidy v. Carr*, 339.
2. **JUDGMENT OF PROBATE COURT AN ESTOPPEL.**—If a purchaser of land at an administrator's sale fails to pay the purchase-money, and for that reason an application is made for a re-sale of which the purchaser receives personal notice and fails to appear, and a re-sale is ordered by the Probate Court, and is made at a less sum than that bid by the former purchaser, and the administrator sues to recover the difference between the two sales, the judgment of the Probate Court ordering a re-sale estops the defendant from setting up or proving in defense, that the administrator made fraudulent representations or defrauded him at the sale; or that the administrator, after the sale, paid him back the ten per cent. deposit, and released him from his bid, and took an assignment of his bid, or that the sale was cancelled by the administrator because he could not give the defendant possession. *Brummagin v. Ambrose*, 366.
3. **JUDGMENT AT LAW NOT A BAR TO RELIEF IN EQUITY.**—A judgment in ejectment obtained by the grantee of a deceased person against the executors of his estate, even if binding on the creditors of the testator to the same extent that it is binding on the executors, the defendants, is not a bar to a bill in equity filed by the executors or the creditors of the testator, to set aside the deed on which the judgment in ejectment was obtained, as having been made to defraud creditors. *Hills v. Sherwood*, 386.
4. **ESTOPPEL BY JUDGMENT IN CASE OF CONTEST TO PURCHASE LAND.**—If a party makes an application to the Register of the State Land Office to purchase a sixteenth or thirty-sixth section of public land, and one who has obtained a patent to the land from the United States files a protest, claiming that the title is not in the State, and that he has the better right to purchase, and the contest is referred to the District Court for trial, and the District Court adjudges that the title to the land is not in the State, and that neither party has a right to purchase the land from the State, and the applicant afterwards obtains a patent from the State, the applicant is estopped by the judgment from averring that the patent from the State vested in him the title to the land, and from denying that the patent issued by the United States transferred to the patentee the title to the land, and the patent issued by the State is void. *Thompson v. True*, 602.

5. **ESTOPPEL BY JUDGMENT.**—If the matters determined by a judgment against a defendant are set forth in the complaint, the question, as to whether the defendant is estopped by it, arises on the complaint. *Id.*

See **NEW TRIAL**, 3; **EQUITY**, 8; **EJECTMENT**, 8; **MORTGAGES**, 7.

EVIDENCE.

1. **JUROR MAY BE WITNESS.**—A juror is not disqualified from becoming a witness in a proper case, but public policy prohibits him from impeaching his own verdict by an affidavit, that a juror made statements in the jury-room of matters not in evidence. *People v. Doyell*, 85.
2. **IMPEACHMENT OF WITNESS.**—When an attempt is made to impeach a witness by proving former statements made by him in conflict with what he has stated before the Court, his credit cannot be sustained by proof that he made to other persons, before being called as a witness, the same statement detailed in his testimony. *Id.*
3. **IDEM.**—Such statements made by the witness may, however, be admissible in contradiction of evidence tending to show that the statement made by him under oath is a fabrication of a late date, if the statements were made before their effect could be foreseen; and, perhaps, in other peculiar cases. *Id.*
4. **PROCEEDINGS IN BANKRUPTCY AS EVIDENCE.**—In an action by the assignee in bankruptcy of a *cestui que trust* of the pledgor, brought against the pledgee, to recover the pledge or its value, where the trust was secret, and no offer was made to redeem the pledge, proceedings in the United States District Court on the bankruptcy of the *cestui que trust* are admissible in evidence on behalf of the defendant. *Thompson v. Toland*, 99.
5. **SIGNING RECORDS OF A CORPORATE BOARD.**—The general rule, that every public document which is required by law to be executed by a public officer must be verified by his official signature, does not extend to the proof of the records of a corporate board which exercises powers municipal and *quasi* legislative. *People v. N. L. & Y. C. Co.*, 143.
6. **IDEM.**—The Chairman and Clerk of the Corporate Board, exercising powers municipal and *quasi* legislative, sign the record of its proceedings, not as certifying to their own official action, but as witnesses that the record is the record made up by the clerk, under the direction of the Board. *Id.*
7. **DECLARATIONS OF VENDOR AS EVIDENCE.**—The declarations of a vendor, made after a sale and delivery of personal property, are not admissible in evidence to show fraud in the sale. *Hutchings v. Castle*, 152.
8. **DECLARATIONS OF AGENT AS EVIDENCE.**—The declarations of an agent of a vendee whose agency is limited to the care and custody of goods after they have passed to the possession of the vendee, are not admissible in evidence to show that the purchase by the vendee was fraudulent. *Id.*
9. **EVIDENCE OF BOUNDARY OF LAND.**—A tract of land, called the "McDougal tract," when conveyed, was intended by the parties to be bounded on the south by another tract called the "McKinstry tract:" *Held*, that a deed conveying the "McKinstry tract," given after the conveyance of the "McDougal tract," was not admissible in evidence to show the south-

- ern boundary line of the "McDougal tract," nor for the purpose of showing what lands the owners of the "McDougal tract," when they received their deed, supposed the owners of the "McKinstry tract" held. *Outter v. Caruthers*, 178.
10. **OBJECTION TO A DEED AS EVIDENCE.**—It is not a good objection to the introduction of a deed in evidence, that it is not shown to include the premises in controversy. The calls of the deed are to be located after it is received in evidence. If it appears on the face of the deed that it does not include the premises in controversy, it may be objected to on that ground. *Id.*
11. **ASSAILING CREDIBILITY OF A WITNESS.**—The credibility of a witness may be assailed by proof that he cherishes a feeling of hostility toward the party against whom he is called; and this hostility may be established by proof of the acts or declarations of the witness, provided his attention is first called to the particular acts or declarations proposed to be proved, with sufficient minuteness as to time and circumstances. *Silvey v. Hodgdon*, 185.
12. **IDEM.**—If it is proposed to assail the credibility of a witness by a letter in which hostility is shown to the party against whom he is called, and the letter is shown to the witness, and he denies writing it, the handwriting may be proved by other witnesses. *Id.*
13. **PROOF OF A CONVERSATION HELD IN TWO LANGUAGES.**—A conversation between a person indicted for murder, and his victim, while alive, held partly in Chinese and partly in English, may be proved, that part of it held in English by persons present who understood English only, and that part of it held in Chinese by persons present who understood Chinese, provided that both the accused and his victim understood both languages. *People v. Ah Wee*, 236.
14. **OBJECTION TO EVIDENCE.**—If a witness, on cross-examination, is asked if he was not arrested for vagrancy, an objection that the record is the best evidence is not tenable; for an arrest does not necessarily imply that there was any record. *People v. Manning*, 335.
15. **IMMATERIAL AND INCOMPETENT EVIDENCE.**—There is a wide distinction between immaterial and incompetent evidence. Evidence may be material and tend to prove an issue, but incompetent under the rules of law for that purpose. *Id.*
16. **IDEM.**—An objection that evidence is immaterial, does not raise the point whether it was competent and admissible to impeach the witness, or competent to go to his credibility. *Id.*
17. **OBJECTION TO EVIDENCE.**—A party objecting to evidence, must specify the ground of his objection, and waives all objections not so specified. *Id.*
18. **OBJECTION TO TESTIMONY.**—It is not error to admit irrelevant testimony, if an objection that it is irrelevant is not made. *Roper v. McFadden*, 346.
19. **OBJECTION TO EVIDENCE.**—If, on a trial before the Court without a jury, evidence is admitted, subject to an objection made, and afterwards, on the final hearing, the Court rejects it, this is sustaining the objection, and the party objecting cannot complain. *Id.*

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20. **CONFLICT IN EVIDENCE.**—The Judge of the Court below, who hears the oral testimony, and observes the conduct and bearing of the witnesses, is best able to pass on it when there is a conflict, or when there are discrepancies and inconsistencies, and the appellate Court will not disturb his finding. *Id.*
21. **ADMISSION OF DEED IN EVIDENCE.**—If, in ejectment, there is evidence of the former possession of the party under whom the defendant claims, the deed of such party is admissible on behalf of the defendant. *Id.*
22. **JUDGMENT AGAINST EXECUTOR AS EVIDENCE.**—A judgment obtained by a creditor of the estate against an executor proves, *prima facie*, the indebtedness of the testator to the plaintiff, as against the grantees of the testator, in a suit in equity to set aside the conveyance of the testator as fraudulent. *Hills v. Sherwood*, 388.
23. **OFFERING DEED IN EVIDENCE.**—If a deed of a tract of land contains a clause excepting from its operation such portions of the tract as had previously been conveyed by the grantor, the grantee, in ejectment to recover a parcel of the tract, may introduce it in evidence, without previously proving that the premises in controversy had not been conveyed by the grantor when the deed was given. *Hagar v. Spect*, 406.
24. **EVIDENCE OF DECLARATIONS.**—In an action for goods sold, when the issue made is, whether the credit was given to the defendant who obtained the goods, or to another person, the declarations of the vendor made to such other person, after the transaction has been completed, and some time has elapsed, are not a part of the *res gestæ*, and are not admissible in evidence on behalf of the plaintiff. *Whitney v. Durkin*, 462.
25. **EVIDENCE THAT WITNESS IS A PROSTITUTE.**—If the evidence of a witness, introduced by the people in a criminal case, shows that she is a prostitute, the defendant is not injured by a refusal of the Court to allow him to prove that she is reputed to be a woman of that character. *People v. Reed*, 553.
26. **COPY OF WRITING AS EVIDENCE.**—If a copy of a conveyance is admitted in evidence, without an objection that it is not the best evidence, or that the loss of the original is not shown, it has the same effect as evidence that the original would have had. *Rewrick v. Goldstone*, 554.
27. **EVIDENCE OF CUSTOM AMONG BROKERS.**—In an action brought to recover a sum of money alleged to be due as the first payment or margin on a written contract for the sale of stock by a member of a Board of Brokers, to be delivered to the buyer in thirty days, if the contract acknowledges the receipt of such first payment, the plaintiff may give evidence of what the custom of the Board of Brokers was with regard to making and delivering such contracts, for the purpose of accounting for the delivery of the contract without receiving the money. *Winans v. Hassey*, 635.
28. **RECEIPT ONLY PRIMA FACIE EVIDENCE OF PAYMENT.**—A receipt in a broker's contract for the sale of stock, acknowledging the receipt of the first payment or the margin on the contract, is only *prima facie* evidence of the payment of the money, and may be explained by parol testimony. *Id.*

29. **OBJECTION TO TESTIMONY.**—An objection to testimony should specify the grounds of the objection. *Id.*

See **CRIMINAL LAW**, 13; **SOLE TRADER**, 1; **BILLS OF EXCHANGE**, 3; **FINDING OF FACTS**, 2; **CRIMINAL LAW**, 32, 33; **NEW TRIAL**, 11.

EXCEPTIONS.

1. **EXCEPTIONS TO CHARGE OF COURT TO THE JURY.**—The Court can protect itself from a hasty perusal and adoption of written instructions to a jury asked by counsel, by a rule that they shall be submitted to counsel on the other side, and be settled by the Court before argument, and therefore an exception in form to each of such instructions is sufficient; but exceptions to an oral charge ought to point out the specific portions excepted to, and be made at the time. *Robinson v. W. P. R. R. Co.*, 409.

See **BILL OF EXCEPTIONS**.

EXECUTION.

1. **VENDITIONI EXPONAS.**—There is a distinction between cases where a *venditioni exponas* is issued for the sale of personal property, and where it is issued for the sale of land. A *venditioni* issued in the former case must go to the officer who made the seizure. *Clark v. Sawyer*, 133.

2. **COURT MAY ORDER VENDITIONI EXPONAS TO ISSUE.**—When a sheriff, who levies a *fieri facias* on land, goes out of office before having sold, the Court may, by an order, direct his successor to sell the property levied on, and a *venditioni exponas* may be issued to such successor, and he may then sell and execute a deed to the purchaser. *Id.*

3. **TO WHOM VENDITIONI EXPONAS IS TO ISSUE.**—In cases where a sheriff who has received a *fieri facias*, and made a levy on land, goes out of office without having sold, if a *venditioni exponas* is issued for the enforcement of the lien, no reason is perceived why it must necessarily be executed by the retiring Sheriff who made the levy, and not by his successor in office. *Id.*

See **DEEDS**, 2, 3, 4.

EXECUTOR.

See **ESTATES OF DECEASED PERSONS**, 8, 9, 10.

FEEES.

1. **SHERIFF'S FEES FOR KEEPING PROPERTY.**—A Sheriff is not entitled to keeper's fees, or the expense of feeding stock under attachment, unless the Court from which the writ issues certifies that the charges are just and reasonable. *Gell v. Stevens*, 590.

FENCE.

See **EJECTMENT**, 8.

FINDING OF FACTS.

1. **IMPLIED FINDING.**—When there is no express finding upon the issue, a finding will be implied in support of the judgment, if the findings were

filed before the Code of Civil Procedure took effect. *Fratt v. Toomes*, 28.

2. COURT MAY DISREGARD ILLEGAL EVIDENCE RECEIVED.— If illegal evidence is admitted on the trial, the Court does not err in refusing to find a fact proved by such evidence. *Hutchings v. Castle*, 152.
3. PRESUMPTION AS TO FINDING OF FACTS.— The presumption is that all the material issues were found in favor of the party who recovers a judgment. *Howard v. Throckmorton*, 482.

See JURY, 6, 7, 8.

FORCIBLE ENTRY AND DETAINER.

1. EVIDENCE OF TITLE IN FORCIBLE ENTRY AND DETAINER.— In an action of forcible entry and detainer, a defendant may introduce evidence of title in himself, not for the purpose of establishing or trying title, but for the purpose of showing that his entry, if wrongful, was not made with a wrongful intent, but in good faith; and if he does so, the plaintiff cannot, in rebuttal, introduce evidence showing title in him. *Dennis v. Wood*, 361.
2. UNLAWFUL ENTRY AND DETAINER.— If a defendant, in an action of forcible entry, enters upon the demanded premises in good faith, under claim and color of title, his entry is not unlawful within the meaning of the Forcible Entry and Detainer Act. *Id.*
3. REVERSAL OF JUDGMENT IN UNLAWFUL DETAINER.— If judgment passes against the defendant in unlawful detainer, and the plaintiff is placed in possession of the premises, and the defendant appeals, and the judgment is reversed, the defendant is entitled to be restored to the possession, even if the plaintiff has rented the premises to a tenant. *Pico v. Ouyas*, 639.
4. UNLAWFUL DETAINER.— A party cannot recover possession of premises under the Act allowing an action of unlawful detainer to be brought against a tenant holding over or failing to pay rent, unless the relation of landlord and tenant exists by convention. *Id.*
5. PARTNER CANNOT MAINTAIN UNLAWFUL DETAINER AGAINST COPARTNER.— If the owner of a hotel leases the same, and then enters into such a partnership with the lessee as to destroy the lease, he cannot afterwards maintain an action of unlawful detainer against his partner and former tenant. *Id.*

FRANCHISE.

See WHARF, 1.

FRAUD.

1. FRAUDULENT CONVEYANCE BY A CORPORATION.— If the persons interested in one railroad corporation form a new one, which chooses for its officers the officers of the old corporation, and the persons owning the stock of the old corporation receive, in exchange therefor, stock of the new, and the trustees then cause the property of the old corporation to be conveyed to the new, the conveyance is a fraud upon the creditors of the old corporation. *S. F. and N. P. R. R. Co. v. Bee*, 398.

See STATUTE OF FRAUDS, 1; EQUITY, 13, 16.

GOLD COIN.

See JUDGMENTS, 8.

GUARDIAN.

See PARTIES TO ACTIONS, 1.

HIGHWAYS.

See STREETS.

HUSBAND AND WIFE.

1. **IMPROVEMENTS BY HUSBAND ON WIFE'S PROPERTY.**—If the wife has the legal title as of her separate estate, the building of fences and other acts of possession done by her husband will be considered to have been done by him as her agent, for her benefit, and in subordination to her title. *Stodd v. Duane*, 358.

See EJECTMENT, 6.

INJUNCTION.

1. **ENJOINING SALE FOR TAX.**—An injunction will not be granted to restrain the collection of a tax by a sale of the real estate of the taxpayer. *Q. P. R. R. Co. v. Corcoran*, 65.

See MORTGAGES, 10.

INSOLVENT DEBTORS.

1. **ASSIGNEE IN INSOLVENCY.**—The assignee in insolvency of a person who applies for the benefit of the Act of May 4, 1852, "for the relief of insolvent debtors, and protection of creditors," becomes vested with the title to all the insolvent's property, from and after the surrender, even if it is not mentioned in the schedule, and the assignee does not know of its existence until after the discharge. *Pochlmann v. Kennedy*, 201.

INSTRUCTIONS TO A JURY.

1. **INSTRUCTIONS TO A JURY.**—All the charge of a Court to the jury must be taken together, and if it harmonizes as a whole, and correctly presents the law, a new trial will not be granted because a separate instruction does not contain all the conditions which are to be gathered from the entire text. *People v. Doyell*, 85.
2. **STATEMENT OF TESTIMONY, IN CHARGE OF JUDGE.**—If the Judge in his charge to the jury in a criminal case, undertakes to state a portion of the testimony, the safer way is to recite the language of the witness as taken down by the Reporter, or in the Judge's notes; but when the language of the District Judge is in substance and effect a repetition of the testimony, the defendant cannot complain. *Id.*

See EXCEPTIONS, 1.

INSURANCE.

1. **LIFE INSURANCE POLICY.**—A life insurance policy which provides for the payment of an annual premium on the 31st day of October, during the

continuance of the policy, or for the payment of the same, with the consent of the company, half yearly, or quarter yearly, or thrice yearly in advance, one third of which may be endorsed as a loan, does not, if the assured elects, with the consent of the company, to make payments thrice yearly, and makes the first, extend him credit for the second and third payments to the end of the year. He must make the second and third payments when they fall due. *Howard v. Continental Life Insurance Co.*, 220.

2. **IDEM.**—A clause in such policy that the company, upon proof of death, shall pay the sum insured, "any balance of the year's premium when not all paid at the commencement of the year, or any indebtedness to the company on account of this policy being first deducted therefrom," does not have the effect of extending such credit. *Id.*
3. **IDEM.**—The company is authorized to deduct any instalment not due at the death, but is not compelled to pay the sum insured, with the deduction of an instalment overdue when death occurs. *Id.*

INTERVENTION.

1. **EFFECT OF NONSUIT WHERE THERE IS AN INTERVENTION.**—If there is an intervenor in an action who claims an interest in the property in dispute, adverse to both the plaintiff and defendant, and the plaintiff answers the intervention, raising material issues, his right to be heard on those issues is not affected by a nonsuit granted on the motion of the defendants. *Pochlmann v. Kennedy*, 201.
2. **NONSUIT OF PLAINTIFF DOES NOT DISMISS INTERVENTION.**—If there is an intervenor who claims an interest in the matter in dispute, adverse to both plaintiff and defendant, and they answer the intervention raising material issues, and, on motion of the defendant, the Court nonsuits the plaintiff, the action is still pending as to the issues raised on the intervention, and the Court should proceed and try them. The intervention should not be dismissed on the ground that there is no action pending. *Id.*
3. **MOTION TO DISMISS AN INTERVENTION.**—A motion to dismiss an intervention, like a motion for a nonsuit, should point the attention of the Court and of the opposite counsel to the precise grounds on which it is made. *Id.*

JUDGMENTS.

1. **WHEN PARTY MAY BE DECLARED BOUND BY A JUDGMENT.**—If judgment is rendered against a party upon several promissory notes signed by him, and one of the notes is also signed by two other persons who are made parties defendant, but are not served with process and do not appear, such other persons may be brought into Court to show cause why they should not be bound by the judgment, to the extent of the note which they signed, and they may be declared bound by it. *Sneath v. Griffin*, 488.
2. **PRESUMPTION THAT JUDGMENT IS CORRECT.**—All intendments, consistent with the record in the appellate Court, must be taken in support of the judgment. *Doyle v. Franklin*, 537.

3. **MOTION TO VACATE SATISFACTION OF JUDGMENT.**—When the attorney for a party enters satisfaction of a judgment recovered by his client for a sum less than the amount of the judgment, and the client moves to have the satisfaction vacated, and for an execution to issue, and the testimony is conflicting as to whether the attorney had authority from his client to enter such satisfaction, and the Court below denies the motion, the Supreme Court will not disturb the decision of the Court below. *Fuller v. Baker*, 632.
4. **SATISFACTION OF JUDGMENT BY AN ATTORNEY.**—The question not decided whether an attorney at law, as such, has power, without receiving authority from his client, to enter satisfaction of a judgment recovered by such client, upon the payment of a less sum than the amount of the judgment. *Id.*
5. **JUDGMENT IN GOLD COIN.**—If the complaint alleges that the contract sued on called for payment in gold coin, and the answer admits it, the plaintiff, if he recovers, is entitled to a judgment payable in gold coin, and the verdict of the jury need not specify the kind of currency or money to be recovered. *Winans v. Hassey*, 634.

JURISDICTION.

1. **TRANSFER OF RECORDS FROM COURTS OF FIRST INSTANCE.**—When, in 1850, the Records of the Courts of First Instance in California were transferred to the District Courts, the latter Court possessed as plenary power over the judgments formerly rendered in the Courts of the First Instance as it had over its own judgments. *Clark v. Sawyer*, 133.
 2. **AUTHORITY OF COURTS OVER PROCESS.**—District Courts have jurisdiction to make all necessary orders respecting process issued, or to be issued, on their judgments. *Id.*
 3. **COLLATERAL ATTACK ON ORDER OF COURT.**—When a Court makes an order, and it does not appear on the face of the record that the Court did not have jurisdiction to make it, it will be presumed, in a collateral attack, that the parties were before the Court, and that the proper proceedings were had to authorize the Court to make the order. *Id.*
 4. **JURISDICTION OF DISTRICT COURT.**—If the complaint avers the value of the property in controversy to be more than three hundred dollars, the District Court has jurisdiction, though the judgment recovered is for less than three hundred dollars. *Pennybecker v. McDougal*, 160.
- See LANDS, 10; BANKRUPTCY, 5; CONSTITUTIONAL LAW, 4, 5; WATER COMMISSIONERS, 1.

JURY.

1. **CHALLENGE TO THE PANEL.**—An amended challenge to the panel of jurors, is a substitute for the original. *People v. Brown*, 253.
2. **EVIDENCE ON CHALLENGE TO PANEL OF JURORS.**—On a challenge to the panel of jurors in a criminal case, the defendant cannot offer his *ex parte* affidavit in evidence in support of the challenge. On such challenge there must be an oral examination of the witnesses in open Court where they may be cross-examined. *Id.*

3. **IDEM.**— A defendant cannot, by incorporating his *ex parte* affidavit into his statement of the grounds of challenge to the panel of jurors, make it evidence of the facts averred in the statement. *Id.*
4. **QUALIFICATION OF JUROR.**— A person is not disqualified as a juror in a cause because he has formed an opinion from what he has heard concerning the guilt or innocence of the accused which it would require evidence to remove, if the opinion is not an unqualified one, and the juror is willing to give the accused a fair trial. *Id.*
5. **IDEM.**— A person is not disqualified from being a juror in a criminal case because he is unable, when questioned, to define the word "qualified." *Id.*
6. **OFFICE OF TRIAL JURY.**— It is the office of a trial jury, by their verdict, to find the facts in issue, whether general or special, and with the legal effect of those facts they have no concern. *Fitzpatrick v. Himmelmann*, 588.
7. **DISSENT OF JUROR FROM VERDICT.**— Although a juror may, at the last moment, dissent from a verdict rendered, yet that dissent must be founded on the question of fact presented by the verdict, and not upon information received from the Court, as to what is the legal effect of the verdict as found. *Id.*
8. **VERDICT OF JURY.**— If the jury have special issues submitted to them, and find on these issues, and also find a general verdict for the plaintiff, and when the verdict is read, the Court declares that on the findings the defendant must have judgment, and some of the jury then dissent from the special verdict, and the Court sends them out for further deliberation, and they then return with general verdict, but are unable to agree on the special verdict, the Court should not accept the general verdict. *Id.*

See CRIMINAL LAW, 89.

LANDLORD AND TENANT.

1. **ADVERSE POSSESSION BY A TENANT.**— The tenant cannot, during the term of a lease, hold adverse possession against the landlord by the mere intention so to hold, and without the doing of some act which would amount to adverse possession by a tenant who enters under a lease. *Abbey Homestead Ass'n v. Willard*, 614.

LANDS.

1. **CERTIFICATE OF PURCHASE OF STATE LANDS.**— The Act of March 23, 1868, which provides that State certificates of purchase of land shall be received as *prima facie* evidence of title, applies to all certificates of purchase issued after the Act took effect, whether issued upon a location made before or after the passage of the Act. *Young v. Shinn*, 26.
2. **IDEM.**— A certificate of purchase of land, issued by the Register of State Lands before the land has been surveyed by the United States, is void. *Id.*
3. **CONTEST TO PURCHASE PUBLIC LAND.**— When two parties have each an equal right to acquire public land, the one by location and purchase from the State, and the other by locating as a homestead under the laws of

- the United States, the party who first commences his proceedings to acquire the title has the better right. *Id.*
4. **EJECTMENT ON STATE CERTIFICATE OF PURCHASE.**—The holder of a State certificate of purchase of public land, listed over to the State, can recover in ejectment, as against one who filed a homestead claim on the same in the United States Land Office, after the holder of the certificate located it. *Id.*
 5. **POWER OF STATE OVER UNITED STATES LANDS.**—The Legislature of this State cannot authorize parties who have placed improvements, which have become a part of the realty, on public lands of the United States, to remove the same after the lands have become private property. *Pennybocker v. McDougal*, 161.
 6. **BUILDINGS AND FENCES ON PUBLIC LANDS.**—If buildings and fences, which are erected on public lands of the United States, are not attached to the soil, and are not a part of the realty, the United States has no interest in them, and they do not pass to a purchaser from the United States, and the person who constructed them has a right to remove them after a patent has issued to the purchaser. *Id.*
 7. **WHEN DECISIONS OF LAND OFFICERS MAY BE CORRECTED BY COURTS.**—In the absence of fraud or imposition, the decision by the Registers and Receivers of the United States Land Office, of controverted questions of fact which they have jurisdiction to pass on, will not be reviewed by the Courts; but an error committed by those officers in a matter of law may be corrected, and the proper relief granted by the Courts. *Hess v. Banger*, 349.
 8. **SELECTION OF SEMINARY LAND BY THE STATE.**—The selection by the State of public land as a portion of the seventy-two sections granted to the State for the use of a seminary of learning, even if approved by the Register and Receiver of the Local Land Office, does not confer a title on the State until the selection is approved by the Secretary of the Interior, and the plaintiff must prove such approval. *Baker v. Chism*, 467.
 9. **SELECTION OF STATE LAND UNDER ACT OF JULY 23, 1866.**—Land selected by the State prior to July 23, 1866, as a portion of the grants of public land made by Congress, does not become the property of the State under the curative Act of Congress of July 23, 1866, until the selection has been certified over to the State by the Commissioner of the General Land Office. *Id.*
 10. **REFERENCE OF LAND CONTEST TO DISTRICT COURT FOR TRIAL.**—If an application is made to the Register of the State Land Office to purchase land, and a protest is filed on the ground that the State has no title, and that the title is in the protestant, and that he has the better right to purchase, and a contest arises before the State Register, which he refers to the District Court for trial, and an action is commenced in the District Court, it has jurisdiction to determine the question whether the State has title to the land. *Thompson v. True*, 602.
 11. **TITLE OF STATE TO SIXTEENTH AND THIRTY-SIXTH SECTIONS.**—An Act of Congress, passed after March 3, 1853, permitting the purchasers from the claimant of a rejected Mexican grant, to enter the land included within the boundaries of the grant; at one dollar and twenty-five cents

per acre, does not divest the State of its title to the sixteenth and thirty-sixth sections within the grant; and a patent issued by the United States under said Act, to one of said purchasers, of a sixteenth or thirty-sixth section, does not convey the title. *Id.*

12. **PATENT TO LAND IN THE SUSCOL RANCH.**—Although the Act of Congress granting the right to purchasers from Vallejo, of land on the so-called Suscol Ranch, to purchase from the United States, does not expressly provide for a patent to issue to the purchaser; still a patent must issue, as the usual mode of transmitting the legal title. The patent issued by the United States to a purchaser of land which was a part of the so-called Suscol Ranch, cannot be attacked by a private person on the ground that the patentee had not the requisite possession to entitle him to purchase under the Suscol Act, unless such person connects himself with the title to the land. *Id.*

See EJECTMENT, 1, 2, 3; CONTRACTS, 3, 4; ESTOPPEL, 1; PRE-EMPTION, 1, 2; CONVEYANCES, 2.

LAW OF A CASE.

1. **THE LAW OF A CASE.**—A decision rendered in the Supreme Court upon facts appearing in the record, in which the legal effect of these facts is declared, is in all subsequent proceedings in the case, and so long as the facts appear without material qualification, a final adjudication of the rights of the parties, from which the Court cannot depart, nor the parties relieve themselves. *Jaffe v. Skas*, 541.
2. **LAW OF A CASE.**—When the Supreme Court has settled the law of a case, the Court below has no right to assume that the law is otherwise than as settled, because of statements in affidavits filed in the Court below, that the party in whose favor the law was settled, claims that it is otherwise. *Pico v. Ouyas*, 639.

LEGAL TENDER NOTES.

See BILLS OF EXCHANGE, 2, 3, 4, 5; NEW TRIAL, 2.

LEGISLATIVE POWER.

See LANDS, 5, 6.

LICENSES.

See CONSTITUTIONAL LAW, 12.

LIENS.

1. **LIENS OF MECHANICS AND MATERIAL MEN.**—There is no constitutional objection to a statute securing a lien to material men, who, at the instance of a contractor, furnish him with materials which are used in the construction of the building, provided the aggregate liens do not exceed the contract price, as fixed by the owner and contractor. *Whittier v. Wilbur*, 175.
2. **IDEM.**—If the statute gives the material man a lien on the building for materials furnished by him to a contractor who contracts with the owner.

the contractor and owner cannot deprive the material man of his lien, by a clause in the contract, by which the contractor agrees to indemnify the owner against any liens taken by persons furnishing materials to be used in constructing the building. *Id.*

3. **IDEM.**— If the material man obtains judgment against the owner, and against the property, the owner may deduct the amount of the judgment from any sum due the contractor, on the contract price. *Id.*
4. **LIEN OF SUB-CONTRACTOR.**— The lien of a sub-contractor, under the Act of March 30, 1868, "for securing liens of mechanics and others," does not depend on, and is not suspended until the completion of the building. *Quale v. Moon*, 478.
5. **DEFENSE OF OWNER AGAINST LIEN CLAIMED BY SUB-CONTRACTOR.**— If, in an action by a sub-contractor to enforce a lien on a building, in a case where the contractor abandoned the contract before the building was completed, the owner relies for a defense on a clause in his contract with the contractor, which provides, "that should said contractor refuse or neglect to supply a sufficiency of materials, the owner shall have the power to provide materials and workmen, after three days' notice in writing being given to finish the said works, and the expense will be deducted from the amount of the contract," he must aver, in his answer, that the contractor neglected to supply a sufficiency of materials, and was notified in writing to proceed with the work in three days, or that the owner would complete the house himself. *Id.*
6. **IDEM.**— If, in such case, the owner relies on the fact that the sum he has paid the contractor before he abandoned the work, and the cost of completing the building, amounts to more than the contract price, he must aver, in his answer, that the sum paid the contractor was due when it was paid, and that the aggregate of liens sought to be foreclosed exceed the amount which was to be paid the contractor, and that the sums paid out by him after the abandonment by the contractor, were paid to complete the building according to the terms of the contract. *Id.*
7. **CONSTITUTIONALITY OF LIEN LAW.**— The Act of 1868, for securing liens of mechanics and others, does not, because it fails to give to laborers other than those working on mining claims, a lien, violate the provision in the Constitution, "all laws of a general nature shall have a uniform operation." *Id.*
8. **ACTION TO ENFORCE MECHANICS' LIEN.**— A mechanic, in an action to enforce a lien for work and material on a building, may unite a cause of action for work and material furnished a contractor, with a cause of action for work and material furnished at the request of the owner. *Id.*

LIMITATION OF ACTIONS.

1. **ADVERSE POSSESSION OF LAND.**— An adverse possession of land which will bar an action to recover possession of it, under the Statute of Limitations, is a possession merely hostile to the particular claim of the other party in the action, to which it is opposed in proof. *McManus v. O'Sullivan*, 7.
2. **IDEM.**— Such possession does not lose its character as adverse, because it is in subordination to the title of the paramount proprietor, unless the other party derails his claim from such paramount proprietor. *Id.*

3. **LIMITATION OF ACTIONS.**—A person in the mere naked possession of Pueblo land in San Francisco, and whose claim is not connected with the title of the city, and who was ousted in 1861 by a party who thence held adversely to him, cannot insist that such party shall be deprived of the benefit of the Statute of Limitations, because holding in subordination to the title of the city. *Id.*
4. **STATUTE OF LIMITATIONS.**—The Statute of Limitations did not commence running against the city of San Francisco, with reference to the Pueblo lands confirmed to it by the decree of the Circuit Court of the United States, May 18, 1865, until the passage of the Act of Congress of March 8, 1866, quieting the title of the city to said lands. *Id.*
5. **TRANSCRIPT ON APPEAL.**—The party appealing, when he relies on the Statute of Limitations, should see that the transcript shows when the action was commenced. *Pratt v. Toomes*, 28.
6. **LIMITATION OF ACTIONS.**—The Statute of Limitations in relation to land claimed under a Mexican grant which requires confirmation does not commence running until a patent is issued by the United States. *Hagar v. Spect*, 406.
7. **IDEM.**—A possession, in order to confer a title to land under the Statute of Limitations, must be continuous for the full period of five years. *Id.*
8. **LEASE INTERRUPTS ADVERSE POSSESSION.**—The taking of a lease by one in adverse possession, interrupts the running of the Statute of Limitations, and any subsequent adverse possession cannot be added to the time which had run prior to the lease. *Abbey Homestead Association v. Willard*, 614.

LIQUORS.

See CONSTITUTIONAL LAW, 12.

MANDAMUS.

1. **MOTION FOR JUDGMENT IN MANDAMUS CASE.**—A motion by the applicant for a writ of mandamus, that the writ issue notwithstanding the matters alleged in the defendant's answer, amounts to a general demurrer to the answer. *Ward v. Flood*, 36.
2. **REFUSAL TO PERFORM A DUTY.**—The general rule that if a party whose duty it is to perform some act, bases his refusal to perform it on some defect in the proceedings of his adversary, he will not afterwards be permitted to allege a new or additional defect, does not apply to officers whose duties are governed by law. *Id.*
3. **ADMISSION OF CHILD INTO PUBLIC SCHOOLS.**—If the principal of a public graded school refuses to receive a child into the school for a reason which is not good in law, but there is a good legal reason for the refusal, the principal, on mandamus to compel him to admit such child, will not be precluded from relying on the true reason why the child should have been refused admittance. *Id.*
4. **IDEM.**—A principal of a public graded school may refuse a child admission as a scholar, provided such child has not sufficient education to enter the lowest grade of such school. *Id.*

MERGER.

See MORTGAGES, 8.

MEXICAN GRANTS.

See ESTOPPEL, 1.

MINING STOCKS.

See STOCKS, 1, 2, 3.

MONEY.

See NEW TRIAL, 3.

MORTGAGES.

1. **ENFORCEMENT OF MORTGAGE.**—The person who conveys land upon an unlawful condition subsequent, and then purchases it back, and executes a mortgage for the purchase-money, cannot resist the enforcement of the mortgage on the ground that the condition subsequent was against public policy, or that there was a want of consideration. *Patterson v. Donner*, 369.
2. **COUNSEL FEES FOR FORECLOSING MORTGAGE.**—A stipulation in a mortgage, allowing counsel fees for a foreclosure, does not entitle the plaintiff to counsel fees unless he pays them, or at least has become liable for them. The plaintiff cannot, under such stipulation, recover counsel fees for foreclosing his own mortgage. *Id.*
3. **MORTGAGE ON PUBLIC LAND.**—If a person is residing on public land subject to preëmption, and executes a mortgage thereon, and then sells the land to another, who takes possession and afterwards preëmpts the land and obtains a title from the United States, the mortgage cannot be enforced against the title thus acquired from the United States, because the preëmptor does not deraign his title from the United States through the person who executed the mortgage. *Bull v. Shaw*, 455.
4. **MORTGAGE IN FEE.**—A mortgage in fee is, for the purposes of the statute which provides that if any person shall convey any real estate by conveyance, purporting to convey the same in fee simple, an estate subsequently acquired by the grantor shall pass to the grantee, a conveyance in fee. *Vallejo Land Commissioners v. Viera*, 572.
5. **DECREE ENFORCING MORTGAGE.**—When the mortgage conveys the estate in fee simple absolute, a decree enforcing the same is, in effect, a decree that the estate vested in the mortgagor at the date of the mortgage, as well as that which shall at any time come to him, be sold, and the Sheriff's deed to the purchaser operates to transfer to such purchaser the estate so directed to be sold. *Id.*
6. **SHERIFF'S DEED ON MORTGAGE SALE.**—The rule that a Sheriff's deed, delivered upon execution sale, transfers to the grantee only such estate as, at the time of sale, was held by the defendant in the execution, has no application to a Sheriff's deed made under a decree enforcing a mortgage in fee. *Id.*

7. **ESTOPPEL BY MORTGAGE.**—A mortgagor, who mortgages in fee, is estopped from denying that the estate mortgaged was other or less than an estate in fee simple. *Id.*
8. **MERGER OF MORTGAGE IN DECREE.**—A mortgage, although in some sense merged in the decree, remains a muniment of the title which passes to the purchaser at the mortgage sale, to be looked to, not only for the purpose of ascertaining the time at which the mortgage lien attached, but also (in the absence of express directions in the decree limiting the estate to be sold,) the estate conveyed by way of mortgage. *Id.*
9. **SALE OF MORTGAGED PROPERTY.**—If a mortgage is recorded, its lien is not affected by sales of the mortgaged property made by the mortgagor pending proceedings to foreclose it. *Broom v. Strelitz*, 645.
10. **ENJOINING SALE OF MORTGAGED PROPERTY.**—An injunction should not be granted to restrain the mortgagor from selling the mortgaged property pending proceedings to foreclose a mortgage. *Id.*

See DEFEASANCE, 1.

MUNICIPAL CORPORATIONS.

1. **LIABILITY OF CITY FOR NEGLIGENCE OF A STREET CONTRACTOR.**—When the Act incorporating a city requires sewers to be constructed under contracts to be let by the city, the contractor, in performing the work, is not the agent or servant of the city; and any negligence in performing the work is his negligence, and the city is not liable for injuries sustained through his negligence. *O'Hale v. Sacramento*, 212.
2. **LIABILITY OF CITY FOR DAMAGES.**—When the charter of a city requires work in improving streets to be done by contract, or by the owners of adjacent lots, the city is not liable for damages sustained by reason of the negligence of the contractor, or owners of adjacent lots, in performing such work. *Krease v. Sacramento*, 221.

See EVIDENCE, 5, 6.

NEW TRIALS.

1. **VERDICT AGAINST EVIDENCE.**—A verdict will not be set aside as contrary to the evidence, where there were but two parties to the transaction, and one of them is dead, and the survivor, the only witness, is contradicted on other matters, and does not testify positively as to the existence of the fact on which the jury found. *Thompson v. Toland*, 99.
2. **AN ADMINISTRATOR A PURCHASER AT HIS OWN SALE.**—Case stated where the evidence shows that an administrator, through another person, was the purchaser at the sale of the intestate's land, made by himself, and where the finding of the Court below, that the administrator was not the real purchaser, is set aside as being not sustained by the evidence. *Guerrero v. Ballerino*, 118.
3. **EFFECT OF STIPULATION BY ATTORNEYS.**—If counsel stipulate in open Court, that the jury may assess damages in currency if they find for the plaintiff, they are estopped from raising an objection to the verdict on that ground. *Dreyfous v. Adams*, 131.

4. **NEW TRIAL.**—The defendant who applies for a new trial after a verdict assessing damages against him, cannot complain that the Court required the plaintiff to remit a portion of the damages as a condition on which a new trial would be denied. *Id.*
5. **RECORDS MUST SHOW ERROR.**—If a party objects to the introduction of a deed in evidence because neither the deed nor the notary's certificate appeared ever to have been sealed, and the objection is overruled, he must make it appear by the record, not only that they bore no seal when exhibited, but that they were not sealed when executed; for seals may have been placed on them, but become detached. *Clark v. Sawyer*, 133.
6. **ERROR.**—He who alleges error must make it clearly appear. *Id.*
7. **EVIDENCE OF A DEFECTIVE ANSWER MUST BE OBJECTED TO.**—If, in an action against a Sheriff for damages for taking goods, by virtue of an attachment, from a vendor of the defendant in the attachment suit, the Sheriff relies on fraud in the sale, but in his answer does not distinctly aver the facts constituting the fraud, and the answer is not demurred to, nor is evidence of the fraud objected to on the trial, a judgment for the plaintiff will not be disturbed, for it is too late to raise an objection to the evidence for the first time in the Supreme Court. *Hutchings v. Castle*, 152.
8. **JUDGMENT NOT REVERSED FOR ERROR WHICH DOES NO HARM.**—When the Court fails to find on a material issue, and the findings are excepted to for that reason, the judgment will not be reversed if the finding must have been adverse to the appellant. *Id.*
9. **REVIEW OF EVIDENCE IN CRIMINAL CASE.**—The Supreme Court will not disturb a judgment in a criminal case on the ground that the evidence was insufficient to justify the verdict, unless there is either a total deficiency of evidence, or it preponderates so greatly against the verdict as to render it clear that the jury must have acted under the influence of passion or prejudice. *People v. Manning*, 335.
10. **OBJECTION TO AGREED STATEMENT OF FACTS.**—If the parties agree upon the facts, subject to all legal objections, and the agreed statement of facts is admitted in evidence without objection, neither party can raise the point in the Supreme Court, that some of the admitted facts were not admissible in evidence under the pleadings. *Hess v. Bolinger*, 349.
11. **JUDGMENT ON AGREED STATEMENT OF FACTS.**—If the defendant in ejectment sets up in his answer, that the plaintiff obtained a patent for the land as a preëmptioner, and that the defendant was entitled to preëmpt it, and that the plaintiff holds the legal title in trust, but does not aver the facts showing his right to preëmpt, and the parties agree on a statement of facts which entitle the defendant to a judgment, the judgment in his favor will not be reversed, because the answer was defective in not stating such facts. *Id.*
12. **ERROR WHICH DOES NO HARM.**—If the Court, in its charge to the jury, lays down an erroneous principle of law, based on a supposed fact in the case which was not proved, and which the jury could not have found, the other party is not injured by the instruction, and a new trial will not be granted. *Robinson v. W. P. R. R. Co.*, 409.
13. **AN ERROR WHICH DOES NO HARM.**—A judgment will not be disturbed on

account of error in the admission of testimony, if the testimony admitted does no harm. *Baldwin v. Bornheimer*, 483.

14. INSTRUCTIONS REFUSED.— If the evidence does not appear in the transcript, the applicability of instructions asked and refused, cannot be considered on appeal. *Id.*
15. GRANTING NEW TRIAL.— The Supreme Court will not interfere with the action of the Court below in granting or refusing a new trial, when there is a substantial conflict in the evidence, and the circumstance that, intermediate the trial and the determination of the motion for a new trial, a change in the incumbency of the bench in the Court below had occurred, makes no difference in the application of the rule. *Altschul v. Doyle*, 535.
16. IDEM.— When a new trial is asked for on several grounds, and it is granted, and the record does not show for which one of the reasons it was granted, the order granting the new trial will not be reversed, if it may have been properly granted for any one of the reasons assigned. *Id.*
17. RULE WHEN TESTIMONY CONSISTS OF DEPOSITIONS.— When the testimony in the Court below is in the form of depositions, the Supreme Court, on appeal, will re-examine it, and is not bound by the rule which forbids disturbing a judgment where there is a conflict in the evidence. *Lander v. Beers*, 546.
18. SPECIFICATION OF REASONS FOR NEW TRIAL.— If the defendant in ejectment moves for a new trial, and relies on the point that he was entitled to recover upon his evidence of adverse possession, he must include it in his specification of reasons why a new trial should be granted. *Abbey Homestead Association v. Willard*, 614.
19. MOTION FOR NEW TRIAL.— When the notice of a motion for a new trial was served in 1872, the proceedings upon the motion must be determined by the Practice Act then in force, and not by the Code of Civil Procedure. *Maoy v. Davila*, 646.
20. MOTION TO DISMISS MOTION FOR A NEW TRIAL.— If the Court below does not decide a motion to dismiss a motion for a new trial, the appellate Court cannot consider the question. *Id.*
21. IDEM.— If no appeal is taken from an order refusing to dismiss a motion for a new trial, the appellate Court cannot review the order. *Id.*
22. IDEM.— If the record on appeal does not contain any facts in support of a motion to dismiss a motion for a new trial, the appellate Court will not disturb an order denying the motion. *Id.*
23. ORDER GRANTING NEW TRIAL.— If the trial Court grants a new trial on the ground that the evidence is insufficient to support the decision, and the evidence is substantially conflicting, the appellate Court will not disturb the order granting a new trial, even if the order is made by a Judge who did not hear the evidence at the trial. *Id.*

See INSTRUCTIONS TO A JURY ; EVIDENCE, 20 ; JUDGMENTS, 2.

NONSUIT.

1. EVIDENCE AFTER MOTION FOR A NONSUIT.— The Court may permit the

plaintiff to introduce further evidence after a motion for a nonsuit is made; and unless the Court in doing so abuses its discretion, its action will not be disturbed. *Abbey Homestead Ass. v. Willard*, 614.

See INTERVENTION, 1, 2, 3; EJECTMENT, 14.

OATH.

1. OATH ADMINISTERED BY THE COURT.— If the statute requires an oath to be administered by the Court or Judge, and it is administered by the Clerk in open Court, under the direction of the Court, and tested by the Clerk, it is administered by the Court in the sense of the Statute. *Oaks v. Rodgers*, 197.

OFFICERS.

1. DUTY OF OFFICERS WHO ADVERTISE FOR BIDS.— When a County Treasurer is authorized by statute to advertise for bids for the surrender of County bonds, in order that he may redeem them with money in the treasury, he has no authority, in the advertisement, to insert a condition upon which bids will be received, which is not to be implied from the duty to advertise, and which is not necessary to the exercise of his authority; such as that the bonds must accompany the bid; and it is his duty to accept the most favorable bid, even if not accompanied by the bonds. *Mills v. Bellmer*, 124.
2. DEPUTY COLLECTOR OF INTERNAL REVENUE.— A collector of internal revenue for a district must appoint his deputies by an instrument in writing, but need not assign a deputy to a portion of the revenue district by an instrument in writing. *Tiddball v. Halley*, 610.

ORDER OF COURT.

1. ORDER OF COURT.— If an order which is required to be made by the Court is entitled and filed in the Court, and bears the seal of the Court, it will not be considered as an order of the Judge at Chambers, because the words "It appearing to me," are used in it, and the *testatum* clause says "in witness whereof, I have hereunto set my hand." *Oaks v. Rodgers*, 197.

See ESTATES OF DECEASED PERSONS, 7.

PARTIES TO ACTIONS.

1. PARTY TO AN APPEAL FROM ORDER OF PROBATE COURT.— On an appeal from an order of the Probate Court removing a guardian of an estate, and appointing another guardian in his place, taken by the guardian removed, the newly appointed guardian is a necessary party. *Estate of Medbury*, 83.
2. NON-JOINDER OF PARTIES DEFENDANT.— Where there is a non-joinder of parties defendant, and the defect does not appear on the face of the complaint, the objection must be taken by answer or it is waived. It cannot be taken by a motion for a nonsuit. *Parvich v. Bean*, 364.

See BONDS, 1, 2.

PARTITION.

1. **COMPLAINT IN PARTITION.**—The complaint in partition must set forth specifically, so far as known to the plaintiff, the interests of all persons in the premises sought to be partitioned; and if the defendant has two deeds, each purporting to convey an undivided two thirds of the property, and one of them was given as a substitute for the other, that fact must be averred, and if not averred, the plaintiff cannot prove it. *Miller v. Sharp*, 394.

PARTNERSHIP.

1. **PARTNERSHIP NOTE.**—The mere fact that a partner, upon being informed that his copartner has given a firm note for his individual debt, does not deny his liability thereon, does not, *per se*, amount in point of law to a ratification or adoption of the note. *Reubin v. Cohen*, 545.
See EQUITY, 8.

PATENTS.

See LANDS, 12.

PERSONAL PROPERTY.

1. **WHEN A BUILDING IS PERSONAL PROPERTY.**—A building set upon blocks resting on the ground is personal property, and replevin lies to recover it. *Pennybecker v. McDougal*, 161.
2. **WHEN A FENCE IS PERSONAL PROPERTY.**—A portable fence made of posts and boards, and resting on the surface, is personal property. *Id.*

PLEADINGS.

1. **COMPLAINT IN TROVER.**—Under our practice, in an action for taking and carrying away goods, an allegation in the complaint, that the defendant took and carried away the goods, is equivalent to an averment that the defendant converted the goods to his own use. *Hutchings v. Castle*, 152.
2. **JUDGMENT IN TROVER.**—If, in an action of trover, the complaint, in addition to alleging a taking and carrying away of the goods, avers a detention of the same, and it appears on the trial that the defendant had sold the goods before the suit was brought, and the plaintiff recovers judgment only for the value of the goods, the defendant is not injured by the allegation of a detention. *Id.*
3. **WHEN CASE WILL BE SENT BACK WITH LEAVE TO AMEND COMPLAINT.**—When the plaintiff mistakes his remedy and brings an action at law for damages, and his proper remedy is a bill in equity for an accounting, and leaves out a necessary party, but inserts some averments in the complaint which entitle him to some measure of equitable relief, the Appellate Court will not dismiss the action, but will send the case back, with leave to amend the complaint. *Blood v. Fairbanks*, 171.
4. **COMPLAINT AGAINST CITY FOR NEGLIGENCE OF STREET CONTRACTOR.**—When the charter of a city requires work in the improvement of streets to be done by contract, or by the owners of adjacent lots, and an action is

brought against the city for an injury sustained by negligence in the work on such improvements, an averment in the complaint, that the work was being done at the instance of the city, will be construed as alleging that the work was being done as the charter directed. *Krause v. Sacramento*, 221.

5. **RELIEF IN EQUITY ON THE GROUND OF MISTAKE.**—A complaint in equity, claiming relief on the ground of mistake, must not only distinctly aver the fact of the mistake, but also set forth the circumstances under which it occurred, in so far as those circumstances may be necessary to present a case within the rule of equity upon which relief is granted. *Wright v. Shafter*, 275.
6. **FILING SUPPLEMENTAL ANSWER.**—If a supplemental answer contains a recital that it was filed by leave of the Court, and it is a part of the judgment roll brought up by the plaintiff on his appeal, the appellate Court will presume that there was an order of Court allowing it to be filed. *Roper v. McFadden*, 346.
7. **COMPLAINT FOR WORK AND LABOR.**—An allegation in a complaint, that the defendant was, on a day named, indebted to the plaintiff in a certain sum of money for work and labor before that time performed for him at his request, states of a cause of action. *Paulsich v. Bean*, 364.
8. **ADMISSION IN ANSWER.**—If a defendant in his answer admits a material allegation in a complaint, he is afterwards precluded from contesting it. *Howard v. Throckmorton*, 482.

See **NEW TRIAL**, 10; **PARTITION**, 1; **RAILROADS**, 11; **AMENDMENTS**, 1; **BANKRUPTCY**, 1; **CONTRACTS**, 8, 9; **BONDS**, 4.

PLEDGE.

1. **ACQUIRING INTEREST OF PLEDGOR IN STOCK.**—If the person who holds mining stock in secret trust for another, pledges the same for a debt of his own, and the United States District Court, upon the bankruptcy of the pledgor, holds the transaction a fraud on the Bankrupt Law, and compels the pledgee to account to the assignee of the pledgor for the value of the same, and renders judgment against the pledgee, and the pledgee pays the judgment, he thereby acquires the title of the assignee and pledgor, to the stock. *Thompson v. Toland*, 99.
2. **IDEM.**—Though such pledge may be a fraud under the Bankrupt Law, as between pledgor and pledgee, it is nevertheless valid, as between the pledgee and *cestui que trust*. *Id.*
3. **CONVERSION OF STOCKS BY PLEDGEE.**—If one who holds mining stocks in secret trust for another, pledges the same for his debt, without notice to the pledgee of the interest of the *cestui que trust*, and the pledgee sells the stock without previous demand and notice, the right of action for the conversion is in the pledgor, and not in the *cestui que trust*. *Id.*
4. **IDEM.**—If, in such case, the *cestui que trust* has a cause of action outside of the contract of pledge, he must first pay or tender the money for which the stocks were pledged. *Id.*
5. **REDEMPTION OF STOCKS PLEDGED.**—The pledgee of mining stocks, upon a redemption of the pledge, is not obliged to return to the pledgor the

identical certificates pledged, but may return certificates corresponding to those received. *Id.*

6. **IDEM.**—The mere fact that the pledgee of mining stocks sells the particular certificates pledged, does not render him liable as for a conversion of the pledge, provided the pledgee, upon a redemption, restores similar certificates, and has been at all times ready to do so. *Id.*
7. **ACTION BY PLEDGEE FOR CONVERSION OF PLEDGE.**—The pledgee, as against a stranger to the pledgor and wrong doer, who has converted the pledge, may recover its full value; for he is answerable over to the pledgor for any surplus in his hands; and if he recovers in such action, and the wrong doer satisfies the judgment, he thereby acquires a title to the pledge. *Id.*

POWER OF ATTORNEY.

See ATTORNEY IN FACT, 1, 2.

PRACTICE.

1. **TRANSCRIPT ON APPEAL.**—A transcript on appeal must be agreed to by all the parties or their counsel, or certified to by the clerk. A stipulation agreeing to the transcript, signed by the counsel of all the parties except one, is not sufficient. *Estate of Medbury*, 83.
2. **DISMISSAL OF APPEAL.**—A motion to dismiss an appeal because it is frivolous, and intended to delay the execution of the judgment, made intermediate the taking of the appeal and the filing of the transcript, will not be entertained. *Foscalina v. Doyle*, 151.
3. **IDEM.**—On the hearing of such motion the Court will not look into the transcript, if produced in support of the motion, for the purpose of ascertaining the merits of the appeal. *Id.*
4. **REVIEW OF ALLEGED ERROR ADMITTING EVIDENCE.**—The alleged error of the Court below in admitting in evidence a judgment roll cannot be reviewed on appeal, unless the record contains the judgment roll, or a settled abstract of its contents. *Doyle v. Franklin*, 537.

See JUDGMENTS, 1; SUMMONS, 1.

PRE-EMPTION.

1. **DECLARATORY STATEMENT OF A PRE-EMPTIONER.**—The question whether the declaratory statement filed by a pre-emptor, includes a piece of land in controversy, is to be decided on the face of the statement, in the light of the surrounding circumstances. *Hess v. Bolinger*, 349.
2. **RIGHTS OF PRE-EMPTORS.**—The facts, that a pre-emptor settles upon and improves the south half of a quarter section, and files his declaratory statement for that, and the south half of an adjoining quarter section, do not preclude another person from afterwards settling upon and pre-empting the north half of the first named quarter section. *Id.*

See EQUITY, 4, 5, 6; TRUSTS, 2.

PRESUMPTION.

See DEEDS, 6.

PRINCIPAL AND AGENT.

See AGENCY, 1, 2, 3.

PROBATE COURT.

1. **IDEM.**—A judgment of a Probate Court ordering a re-sale of property sold by an administrator for failure of the purchaser to pay the purchase-money, is conclusive on the purchaser, and estops him as to all matters which might have been litigated there. *Brummagies v. Ambrose*, 366.

See ESTATES OF DECEASED PERSONS.

PROMISSORY NOTE.

1. **DEFENSE TO ACTION ON NOTE.**—The maker of a promissory note, as against the payee, may show a want of consideration for the making of the note, and the same, if shown, is a good defense to an action brought on it. *Cohen v. Goss*, 97.

See JUDGMENTS, 1; PARTNERSHIP, 1.

PUBLIC LANDS.

See LANDS.

PUEBLO LANDS.

See EJECTMENT, 1, 2, 3.

PUBLIC POLICY.

See CONTRACTS, 6.

RAILROADS.

1. **NEGLIGENCE OF RAILROAD COMPANY IN CASE OF INJURY TO A PERSON** — If the track of a railroad passes along the street of a city, crossing another street, and a train of cars is stopped in the first street so that the last car in the train stands in the cross-street, and while a person is walking along the cross-street over the track, behind the train, the train, without any notification, is suddenly backed, and the person is knocked down and injured by the cars, the employes of the company are guilty of gross negligence. *Robinson v. W. P. R. R. Co.*, 410.
2. **IDEM.**—The person injured in such case is exercising an undoubted right in crossing the railroad track on a public street, and is not guilty of such want of care or diligence as contributes to the injury, and the railroad company is not released from liability on the ground of contributory negligence. *Id.*
3. **IDEM.**—The person injured in such case had a right to presume that he would be notified that the train was about to move, and was not bound to wait because the train was on the street, or assume that it might move suddenly backward without notice. *Id.*
4. **IDEM.**—If the bell of the train was rung, this does not of itself establish proper care by the employes of the company; for, although the bell is intended to give notice to all, it is the duty of the engineer to see that all have acted on the notice. *Id.*

5. **IDEM.**—In such case the railroad company should provide a lookout, upon whose signal, that the track was clear, the engineer should have acted. *Id.*
6. **IDEM.**— It is no defense to an action for the injury in such case, that the plaintiff, by his own act, has contributed to his injury, but it must appear that by his own fault he has so contributed. *Id.*
7. **IDEM.**— The fact that the agents of the defendant in such case did not know that the person injured was on the track, amounts to culpable negligence on their part. *Id.*
8. **RIGHT TO THE USE OF PUBLIC STREET.**— A foot passenger is not debarred the use of the street because a train of cars occupies a portion of such street. *Id.*
9. **CONTRIBUTORY NEGLIGENCE RELEASES DEFENDANT.**— If the neglect of ordinary care by the plaintiff concurs as a proximate cause in producing the injury for which the action is brought, the railroad company is not liable, even if its agents are at fault. *Id.*
10. **CONTRIBUTORY NEGLIGENCE A MATTER OF DEFENSE.**— In an action for damages for a personal injury, negligence on the part of the plaintiff is a matter of defense, to be proved affirmatively by the defendant, unless it can be inferred from circumstances proved by the plaintiff. *Id.*
11. **COMPLAINT IN ACTION FOR PERSONAL INJURY.**— In an action for damages for a personal injury sustained by the plaintiff from a railroad car, it is not necessary to aver in the complaint that the plaintiff sustained the injury without any fault on his part. *Id.*

See FRAUD, 1; CORPORATIONS, 1.

RECORDS OF MUNICIPAL CORPORATIONS.

See EVIDENCE, 5, 6.

REDEMPTION OF BONDS.

See OFFICERS, 1.

REHEARING.

1. **GRANTING A REHEARING.**— If, upon the argument of a cause in which the proceedings of a Board of Supervisors are sought to be reversed by *certiorari*, any issue of fact is waived, and the question presented is one of law, the counsel cannot, after a decision on the point of law, have a rehearing on the ground that there is a question of fact which should be determined. *Atherton v. Sup. San Mateo Co.*, 157.

REPLEVIN.

1. **DAMAGES IN REPLEVIN.**— In an action of replevin for the materials which, before their removal, composed a fence attached to and a part of the realty, the plaintiff can recover only the value of the materials after their removal, and not the value of the fence as it stood before the removal. *Pennybecker v. McDougal*, 160.

See PERSONAL PROPERTY, 1, 2.

RES JUDICATA.

See ESTOPPEL, 1, 2, 3, 4, 5.

RESTITUTION.

See FORCIBLE ENTRY AND DETAINER, 2.

ROADS AND HIGHWAYS.

1. **QUIETING TITLE TO STREET.**—One who claims title to land alleged to be a public street or highway, cannot maintain an action to quiet his title thereto against a street commissioner of a city, who claims no interest in the land. *Leet v. Elder*, 623.
2. **IDEM.**—Such street commissioner is the mere agent or servant of the city, and his acts done in the performance of his duty in opening streets, are the acts of the city. *Id.*

See STREETS, 1, 2, 3, 4, 5; RAILROADS, 11.

RULES OF COURT.

1. **RULES OF DISTRICT COURTS.**—The Supreme Court does not take judicial notice of the rules of the District Courts. When a party relies on such rules he should have them incorporated in the record. *Outter v. Caruthers*, 173.

See EXCEPTIONS, 1.

SAN FRANCISCO.

See EJECTMENT, 1, 2, 3; CONVEYANCES, 2.

SCHOOLS.

1. **PRIVILEGE OF ATTENDING PUBLIC SCHOOLS.**—The privilege accorded to a child, of attending the public schools, is not a privilege appertaining to a citizen of the United States as such, nor can any person demand admission into such schools on the mere status of citizenship. *Ward v. Flood*, 36.
2. **RIGHT TO ATTEND PUBLIC SCHOOLS.**—The opportunity of instruction in public schools given by the statute to the youth of the State, is in obedience to the special command of the State Constitution, and the privilege thereby granted is a legal right, as much so as a vested right in property. *Id.*
3. **COLORED CHILDREN CANNOT BE EXCLUDED FROM SCHOOLS.**—The Legislature cannot, while providing a system of education for the youth of the State, exclude from its benefits children, merely because of their African descent. *Id.*
4. **SEPARATE SCHOOLS FOR COLORED CHILDREN.**—The law providing for the education of children of African descent in separate schools, to be provided at the public expense the same as other public schools, is not in conflict with the Constitution of this State, nor in conflict with the Thirteenth and Fourteenth Amendments to the Constitution of the United States. *Id.*

4. **IDEM** — When such law exists, colored children may be excluded from schools established for white children, provided schools for colored children are established, affording the same facilities for education; but if such schools for colored children are not established, they cannot be excluded from the schools kept for white pupils. *Id.*

SEPARATE PROPERTY.

See **EJECTMENT**, 6; **HUSBAND AND WIFE**, 1.

SHERIFFS.

See **EXECUTION**, 1, 2, 3; **FEES**, 1.

SHERIFFS' DEED.

See **DEEDS**, 2, 3, 4.

SOLE TRADER.

1. **ORDER MAKING A SOLE TRADER.**— A certified copy of the order declaring a married woman a sole trader, is admissible in evidence, even if, in the order, the Judge uses the first person, as though it was made by him instead of the Court, and the oath attached thereto appears upon its face to have been administered by the Clerk. *Oaks v. Rogers*, 197.

SPECIAL CASES.

See **CONSTITUTIONAL LAW**, 2, 3.

SPECIFIC PERFORMANCE.

See **EQUITY**, 1, 13 14.

STARE DECISIS.

1. **STARE DECISIS.**— Even if property rights have grown up under an erroneous decision with regard to the construction of a clause in the Constitution, it is better that inconvenience should be submitted to, rather than such decision should stand, and a valuable provision in the fundamental law be obliterated. *San Francisco v. S. F. W. W.*, 493.

STATUTE OF FRAUDS.

1. **FRAUDULENT SALE OF PERSONAL PROPERTY.**— D. owned several teams, with which he was engaged in hauling bark for G. Drivers were employed, and D. did not personally superintend the work. The teams were fed and kept nights at a barn on G.'s land, and the drivers slept there. G. met D. at a town several miles from the barn, and bought the teams, and, returning toward the barn, met the teams on the road, and told the drivers of his purchase, and requested them to continue work for him, to which they agreed. He went to the barn the same night, and renewed the arrangement with the drivers, who, the next day, continued hauling bark, and were met by an officer, who attached the teams at the suit of a creditor of D. *Held*, that there was not an actual delivery and continued change of possession as required by the Statute of Frauds. *Gray v. Corey*, 208.

- 2. DAMAGES FOR REFUSAL TO RECONVEY LAND.**—An action will not lie to recover damages for the breach of a verbal contract to reconvey real estate, formerly conveyed by the plaintiff to the defendant. *Bartlett v. Atken*, 405.

See CONVEYANCES, 6.

STATUTES CONSTRUED.

- Act of March 27, 1868, ratifying ordinance 800 of the Board of Supervisors of the City and County of San Francisco, in *McManus v. O'Sullivan*, 7.
- Section 11 of the Act concerning crimes and punishments, and Section 255 of the Act to regulate proceedings in criminal cases, in *The People v. Outeveras*, 19.
- Act of March 28, 1868, (Stats. of 1867-8, p. 508,) in relation to the sale of lands belonging to the State, in *Young v. Shinn*, 26.
- Act of April 22, 1858, for the incorporation of water companies, in *Spencer Creek W. Co. v. Vallejo*, 70.
- Section 88 of the Code of Civil Procedure, fixing the terms of the County Court of Sierra county, in *The People v. Doyell*, 85.
- Amendment of 1856 to the Act of 1850, concerning crimes and punishments, in *The People v. Doyell*, 85.
- Section 1856 of the Code of Civil Procedure, concerning evidence, in *Cohen v. Goux*, 97.
- Section 39 of the Act of April 24, 1858, to incorporate the city of Sacramento, in *Mills v. Bellmer*, 124.
- Act of February 18, 1864, creating a board of Water Commissioners for San Bernardino county, in *Daley v. Cox*, 127.
- Section 6 of the "Act to create a Board of Supervisors," in *The People v. Eureka Lake and Y. C. Co.*, 143.
- Section 3,976 *et seq.* of the Political Code, concerning the removal of county seats, in *Atherton v. Supervisors, etc.*, 157.
- Section 954 of the Penal Code, in *People v. Shepardson*, 189.
- Section 2 of the Act to authorize married women to transact business in their own names (Stats. 1862, 108), in *Oaks v. Rodgers*, 197.
- Act of March 9, 1870 (Stats. 1869-70, 227), providing for the practice on motions to set aside reports of Commissioners, in *Matter of Clear Lake Water Co.*, 586.
- Tenth Section of Act of Congress concerning Collectors of Internal Revenue, passed May 30, 1864 (13 U. S. Stats. at large, 225), in *Tidball v. Halley*, 610.
- Section 20 of Act of 1850, concerning wills (Stats. 1850, 179), in *Estate of Pfuelb*, 648.

STATUTORY CONSTRUCTION.

- 1. TERMS OF COUNTY COURTS.**—The Code of Civil Procedure only purports to deal with the times when the terms of the County Court should be commenced after it went into operation, on the first day of January, 1873. *People v. Doyell*, 85.
- 2. EFFECT OF CODE OF CIVIL PROCEDURE ON TERMS OF COURTS.**—The fact that the Code of Civil Procedure, approved March 11th, 1872, fixed the

time when the terms of a County Court should commence, and repealed a prior statute also fixing the times of their commencement, did not suspend the business of the Court prior to the first day of January, 1873, nor affect the general law which required a term to be continued until the business of the Court was disposed of; nor did it, when it went into effect, put an end to a term then in progress, commenced on the second Monday in December, 1872. *Id.*

3. *IDEM.*—The effect of the repealing clause on the prior statute fixing the terms was, to declare that the terms should not thereafter begin on the days mentioned by virtue of any authority derived from the statute repealed. *Id.*

See BOARD OF SUPERVISORS, 1, 2; ELECTIONS, 1.

STIPULATION.

See NEW TRIAL, 3.

STOCKS.

1. **SALE OF MINING STOCKS.**—If the owner of mining stocks allows his broker, who purchases for him, to hold the certificates in such a manner that they will pass by delivery on the endorsement of the broker, with nothing on the face of the certificates to indicate that the real owner has any interest in the stock, a purchaser in good faith from the broker, without notice of the rights of the real owner, acquires a good title to the same, even if the broker, by a contract with his principal, had no right to sell or hypothecate the stocks without the consent of his principal. *Thompson v. Toland*, 99.
2. *IDEM.*—In this State, mining stocks properly endorsed pass by delivery; and if the true owner places them in the hands of another, on some secret trust between them, without anything on the face of the certificates to show his ownership, he, and not an innocent purchaser or pledgee, must bear the loss. *Id.*
3. **WORD "TRUSTEE" IN CERTIFICATE OF STOCK.**—The addition of the word "trustee," in a certificate of stock, to the name of the person to whom it is issued, does not show that such person has not the full right to deal with it as his own, nor give the person dealing with him notice that any other person has any interest in the same. *Id.*

See PLEDGE, 1, 2, 3, 4, 5, 6.

STREETS.

1. **POWER OF LEGISLATURE OVER STREETS.**—The Legislature has power to vacate a street in a city; and it may delegate such power to the municipal authorities of a city; and after such power has been delegated to the municipal authorities, the Legislature may revoke it in part, as well as in whole, or without any express revocation, may itself exercise it. *Polaok v. S. F. Orphan Asylum*, 490.
2. *IDEM.*—The municipal authorities of a city cannot vacate a street without the consent of the Legislature. *Id.*

3. **IDEM.**—The Legislature may vacate a portion of a street, even if a person owns property fronting on another portion of the street which will incidentally be injured thereby. *Id.*
 4. **GRANT OF EASEMENT IN STREETS.**—The State has no proprietary interest in the streets of a city dedicated to public use; and when it grants to a private corporation an easement over the streets, not common to the public at large, it merely grants, in its sovereign capacity, a franchise, and not any proprietary interest in the streets. *San Francisco v. S. V. W. W.*, 493.
 5. **FEE IN STREETS.**—As a general rule the fee of the streets, in a city dedicated to public use, is in the owners of the adjoining lands, on each side, to the center of the street. *Id.*
- See CONSTITUTIONAL LAW, 20; ASSESSMENTS, 1; ROADS AND HIGHWAYS, 1, 2; RAILROADS, 8.

SUMMONS.

1. **ALIAS SUMMONS** — The Clerk of the District Court is authorized, on demand of the plaintiff, and without an order of Court, to issue an *alias* summons after the expiration of the year during which the original must be issued. *Dunker v. Lutz*, 464.

SURETIES.

1. **SURETIES ON APPEAL BOND.**—The sureties on an appeal bond cannot be sued until the judgment against their principal is in a condition to be enforced by an execution. *Parnell v. Hancock*, 452.
2. **IDEM.**—So long as there is an order of Court in force, staying execution on the judgment, against a party who had appealed from a lower Court, the sureties on his appeal bond cannot be sued. *Id.*

See BONDS, 8.

TAXATION.

1. **SIGNING RECORD OF LEVY OF A TAX** — A tax is not void, because the record of the Board of Supervisors in levying it is not signed by the Chairman and Clerk of the Board. *People v. E. L. & Y. O. Co.*, 143.
2. **ASSESSMENT OF LAND FOR TAXES** — An assessment of a large tract of land for taxes, under the Act of 1861, which describes the whole tract by metes and bounds, and then excepts from the tract parcels of the same which had previously been conveyed, but does not describe the excepted portions by metes and bounds, nor in any manner, except by a reference to recorded deeds, is void on its face. *People v. Cone*, 427.
3. **COMPLAINT IN ACTION FOR TAX.**—The fortieth section of the Revenue Act of 1861, which provides that a complaint, in an action to recover a tax, need not follow the description of the property as found in the assessment, only permits a different description of the property in the complaint from that contained in the assessment, but does not obviate the necessity of showing on the trial a valid assessment of the same land described in the complaint. *Id.*

4. **COMPLAINT TO RECOVER TAX.**— A complaint in an action to recover a tax, which alleges that a portion of the real estate assessed to the defendants belonged to other persons, does not state a cause of action. *People v. Hyde*, 431.
5. **ASSESSMENT FOR TAX.**— An assessment for a tax, in which fifteen thousand and eighty acres of land are assessed by quantity and boundaries, excepting therefrom a portion thereof before sold, without a description of the excepted portion, is void. *Id.*
6. **VOID ASSESSMENT FOR TAXES.**— When the assessor assesses an entire tract of land to a person, and the person assessed had previously sold a part of the same by metes and bounds, and the assessment contains nothing to show what valuation the assessor placed on the part not sold, the assessment is fraudulent and void, and the tax cannot be collected. *People v. Hancock*, 631.

See INJUNCTION, 1.

TREASURER.

See OFFICERS, 1, 2, 3.

TROVER.

See PLEADINGS, 1, 2.

TRUSTS.

1. **IF ADMINISTRATOR BUYS AT HIS OWN SALE, HE BECOMES A TRUSTEE.**— If an administrator becomes a purchaser, through another person, of the land of the estate sold by him, the heirs of the intestate may have him declared a trustee, and compel him to convey the land to them. *Guerrero v. Ballerino*, 113.
2. **CONSTRUCTION OF TRUST DEED.**— A deed conveying land to a trustee who has no beneficial interest, with power to sell and lease, will be most strongly construed against the trustee, and most favorably to the beneficiary under the trust. *Sprague v. Edwards*, 239.
3. **CONVEYANCE OF TRUST LAND BY TRUSTEE.**— When a conveyance is made to a trustee, who has no interest in the trust fund, with power to sell and convey the trust lands, subject to the approval of the *cestui que trust*, the deed of the trustee to a purchaser will not pass the legal title without the approval of the *cestui que trust* in writing. *Id.*
4. **RIGHTS AND DUTIES OF TRUSTEE.**— When a conveyance is made to a person as trustee, and he, at the same time, executes and delivers to the grantor a declaration in writing in which there is no ambiguity, stating the objects and purposes of the trust, the powers and duties of the trustee, with reference to the trust estate, are to be ascertained from the deed and the declaration; and when so ascertained, the rights and duties of the parties must be controlled thereby. *Tyler v. Granger*, 259.
5. **RIGHT OF TRUSTEE TO POSSESSION OF TRUST PROPERTY.**— If the owner of land who is indebted to another person, conveys the same to a third person in trust, and the trustee makes a declaration of the trust in writing, in which it is stated that he holds the land in trust to sell the same at

the end of sixty days and apply the proceeds to the payment of the debt of the *cestui que trust*, unless within said time the *cestui que trust* finds a purchaser who will pay the debt to the trustee, and then to convey the land to such purchaser upon such terms and conditions as the *cestui que trust* may dictate, the trustee has not the right to the possession of the land during the sixty days, nor afterwards. *Id.*

6. *IDEM.*— In such case, if the debt is satisfied before a sale and conveyance made by the trustee in pursuance of the terms of the trust, equity will compel the trustee to make a conveyance to the *cestui que trust* or his assigns, upon the payment of the amount due the trustee for his services and expenses. *Id.*

7. *IDEM.*— In such case the *cestui que trust*, or his assigns, may continue in the use and possession of the property until a sale and conveyance of the same, in pursuance of the terms of the trust. *Id.*

8. **WHEN PRE-EMPTOR WHO RECEIVES A PATENT HOLDS THE TITLE IN TRUST.**
— If the Land Officers of the United States allow a person to enter as a preëemptor, land not included in his declaratory statement, and he receives a patent therefor, he will be held to have the legal title in trust for another person, who was entitled to preëempt the same, and who proved up and tendered payment which was refused. *Hess v. Bollinger*, 349.

See **PLEDGE**, 1, 2, 3, 4; **STOCKS**, 1, 2, 3; **CORPORATIONS**, 1; **EQUITY**, 4, 5, 6;
WILL, 2, 3.

UNDERTAKING ON APPEAL.

See **SURETIES**, 1, 2.

VENDITIONI EXPONAS.

See **EXECUTION**, 1, 2, 3.

VENDOR AND VENDEE.

See **EVIDENCE**, 7, 8.

VENUE.

2. **CHANGE OF VENUE.**— If the action is brought in a county other than that in which the defendant resides, and he moves for a change of venue on this ground, the plaintiff, if he wishes to have the action tried in the county where the action was brought, on account of the convenience of witnesses, must make a counter motion to have it retained. He cannot permit the venue to be changed, and then move to return the case to another county. *Edwards v. S. P. R. R. Co.*, 400.

VERDICT OF JURY.

See **JURY**, 6, 7, 8.

WAIVER.

See **CONTRACTS**, 2.

WATER COMMISSIONERS.

1. **WATER COMMISSIONERS.**—The Board of Water Commissioners for San Bernardino County, created under the Act of February 18, 1864, are merely agents selected for the public convenience, to regulate the distribution of water according to the rights of the parties in interest; but their action in distributing water, does not prevent the parties from applying to the Court for, nor the Court from granting relief, if to any one is distributed more than his just proportion of the water. *Daley v. Coe*, 127.

WHARF.

1. **FRANCHISE TO CONSTRUCT A WHARF.**—An application to the Board of Supervisors for a franchise to construct a wharf in accordance with the provisions of the Act of March 1, 1870, must particularly describe the locality of the wharf. *Templeton v. Coburn*, 563.

WILL.

1. **CONSTRUCTION OF "MONEY" IN A WILL.**—The word "money," used in making a devise in a will, will be construed to include both personal and real property; if it appears from the context, and on the face of the instrument, that such was the intention of the testator. *Estate of Müller*, 165.
2. **CONSTRUCTION OF WILL.**—C., in his will, devised a portion of his property to trustees in trust, to be held and managed for the benefit of a son, in such manner as the trustees should judge for the interest of the son; and to pay over to the son such part of the income as they might think best, until he arrived at the age of thirty years, and then, if they thought he possessed such habits of prudence and economy as to render it proper, to transfer it to him, but otherwise to retain it in trust, and still manage it for his benefit; and at his decease, if still in their hands, to transfer it to his heirs:
Held, that the son, by the devise, took no interest in the property which he could assert in an action against the trustees, even after he arrived at the age of thirty years, and that the title to the property vested in the trustees.
Held, further, that the trust was valid in law, and that its duration could not extend beyond the life-time of the son, and might terminate sooner, if, in the opinion of the trustees, it was prudent to transfer the property to the devisee. *Cuttler v. Hardy*, 568.
3. **WHEN A LEGATEE BECOMES A TRUSTEE.**—If the testator, after making a will in which he devises all his property absolutely, writes a letter to the legatee, stating the trusts upon which the testator intended to devise the estate, and explaining how the legatee was to execute the trusts, and the legatee, during the life-time of the testator, accepts in writing the terms of the trust, and promises to execute it faithfully, a trust is created as expressed in the letter, and a Court of Equity will compel the legatee to execute it. *De Laurencel v. De Boom*, 581.
4. **CONSTRUCTION OF A WILL.**—A will, made before the present Codes took

effect, is to be construed under the statutes in force at the time it was made. *Estate of Pfuels*, 648.

8. CONSTRUCTION OF A WILL.—The word "relation," in the statute, providing that a devise to a relation shall not lapse by the death of the devisee during the life-time of the testator, if the devisee leaves lineal descendants, includes only relations by blood, and not by affinity. *Id.*

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